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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No ~~195~~ 98.

W. T. WAGGONER, PLAINTIFF IN ERROR,

vs.

J. M. FLACK.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED AUGUST 27, 1900.

(17,890.)

(17,890.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 405

W. T. WAGGONER, PLAINTIFF IN ERROR,

vs.

J. M. FLACK.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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1 *Transcript from District Court.*

Caption.

THE STATE OF TEXAS, }
County of Wilbarger. }

At a term of the district court begun and holden at Vernon, within and for the county of Wilbarger, before the Hon. G. A. Brown, and ending on the 1st day of October, A. D. 1898, the following case came on for trial, to wit:

W. T. WAGGONER, Plaintiff, }
vs.
J. M. FLACK ET AL., Defendants. }

Plaintiff's Amended Original Petition. Filed Sept. 24, 1898.

In District Court, Wilbarger County, Sept. Term, 1898.

W. T. WAGGONER }
vs. } No. 1394.
J. M. FLACK ET AL. }

Now comes plaintiff and, by leave of the court first obtained, files this his amended original petition amending his original petition filed herein on 27th April, 1898, and for such amended petition says:

1st. That on 1st day of Feb'y, 1898, he, plaintiff, was owner in fee-simple and entitled to the possession of the land hereinafter described; that on or about the 4th day of Feb'y, 1898, defendant J. M. Flack unlawfully entered upon said land and premises hereinafter described and ejected plaintiff therefrom and dispossessed plaintiff of same, and now unlawfully with-olds from plaintiff the possession thereof, to plaintiff's damage $2,500; that the land and premises owned by plaintiff and from which he has been so unlawfully ejected by defendant J. M. Flack, as aforesaid, are described, viz: Section No. 60, block No. 4, H. & T. C. R. R. Co. survey Wilbarger county, Texas, certificate No. 1048; by metes and bounds: Begin at a stone marked N. W. cor. 59, from which a stone mound on top of a peak bears S. 39¼ W., the N. W. cor. No. 59 and
2 the N. E. cor. this survey; thence S. 72 W. 1,900 vrs. a stone set in the ground marked N. W. 60, the N. W. cor. this survey and the N. E. cor. 48, block 2, from which a stone mound on the top of a peak brs. S. 8 50 E.; thence S. 18 E. 1,900 vrs. a stake, mound, and 4 pits, the N. E. cor. 45 and the S. W. cor. this survey and the N. E. cor. No. 47, block 2; thence N. 72 E. 960 vrs. head of ravine at 1,900 vrs., the S. W. cor. of 59 and the S. E. cor. of this survey; thence N. 18 W. 1,900 vrs. to the place of beginning, containing 640 acres of land, more or less.

Plaintiff avers that F. M. Flack is a mythical person in whose

name application was made by J. M. Flack to purchase this land, and plaintiff now dismisses as to said F. M. Flack.

Plaintiff avers that said land is worth the sum of $2,500. Plaintiff further avers that defendant J. M. Flack has, without his consent and without legal right, pastured stock on said ground from said 4th day of Feb'y until now, as follows: about 40 head of cattle and about 30 head of horses, said pasturage being reasonably worth about 30 cents per month for horses and about 20 cents per month for cattle, and, though often requested to pay plaintiff for said pasturage, defendant J. M. Flack has wholly neglected and refused to do so, and plaintiff asks judgment for such pasturage, and also for title and possession of the land above described, for costs of suit, for writ of possession, and for such other relief as the law and facts warrant.

A. A. HUGHES,
F. P. McGHEE,
Att'ys for Pl'ff.

Plaintiff, by way of second count, alleges that on or about the 20th day of August, 1898, he was the owner of the land above set forth and described and was entitled to the possession of the same; that afterwards, on the 22nd day of August, 1898, defendant J. M. Flack unlawfully entered upon said land and ejected plaintiff therefrom, and now unlawfully withholds from plaintiff the possession thereof, to plaintiff's damage $2,500.

3 That the land in controversy in this suit is worth the sum of $2,500, and plaintiff prays judgment for the title and possession of said land, for writ of possession, and costs of suit.

A. A. HUGHES,
F. P. M'GHEE,
Att'ys for Pl'ff.

Filed Sept. 24th, 1898.

W. B. TOWNSEND, *Dist. Clk.*

Defendants' Original Ans. Filed Sept. 5, 1898.

W. T. WAGGONER vs. J. M. FLACK. No. 1394. Suit Pending in the District Court of Wilbarger County, Tex., Sept. Term, 1898.

Now comes the defendant- in the above entitled and numbered cause and demurs to plaintiff's original petition herein for the reason that it fails to allege facts sufficient to constitute a cause of action, and of which *he* prays the judgment of the court.

And for answer herein defendants deny all and singular the allegations in plaintiff's petition contained and demand strict proof thereof, and of which they put themselves upon the country.

And defendants, further answering, say they are not guilty of the trespasses and wrongs and damages alleged in the plaintiff's said petition, and of which they put themselves upon the country.

J. A. LUCKY,
Att'y for Defendant-.

Filed Sept. 5th, 1898.

W. B. TOWNSEND, *Dist. Clk*,
By C. P. SMITH, *Dep.*

4 *Judgment of Court.*

W. T. WAGGONER
vs.
J. M. FLACK ET AL. } No. 1394.

SEPT. 29TH, 1898.

On this day this cause was called for trial and the plaintiff appeared in person and by attorney and announced ready for trial; and the defendant J. M. Flack appeared in person and by attorney and announced ready for trial. The plaintiff dismissed his suit herein against F. M. Flack, and he goes hence without day and is not required to answer further herein. The jury being waived and the matters of fact as well as of law being submitted to the court, who, after hearing the pleadings read and the introduction of evidence and argument of counsel, is of opinion that the law and facts are in favor of the defendant J. M. Flack, and that he should recover the title and possession of the land and premises in suit herein.

It is therefore considered, ordered, and adjudged by the court that the plaintiff, W. T. Waggoner, take nothing by his suit herein, and that the defendant J. M. Flack be quieted in his title and possession of the land and premises in suit herein and described as follows, to wit: Situated in Wilbarger county, Texas, and being all of section No. 60, in block No. 4, H. & T. C. R. R. Co.'s survey, in Wilbarger county, Texas, surveyed for common-school fund, by virtue of certificate No. 1048, issued to said R. R. Co., and for which he may have his writ of possession. It is further ordered that the plaintiff pay all costs in this suit incurred, for which execution may issue to collect the same.

5 *Motion for New Trial. Filed Sept.* 29, 1898.

In District Court of Wilbarger County, Texas, Sept. Term, 1898.

W. T. WAGGONER
vs.
J. M. FLACK ET AL. } No. 1394.

Now comes plaintiff and moves the court to set aside its judgment herein rendered against him and to grant him a new trial on the following grounds:

1st. Defendant J. M. Flack had no right to the land in suit, and plaintiff had the right under act of 1897 to reinstate the account, for he tendered all the interest due the State, both on 16th Dec., 1897, and also on 13th August, 1898, to State treasurer on written application, and said forfeiture of Aug. 20th, 1897, of rights of D. B.

Phillips, under whom plaintiff claims, was premature, for act of 1897 had gone into effect, and said forfeiture could not be legally made prior to 1st Nov., 1897.

2nd. Act of legislature of 1885, Feb'y 23rd, declaring no forfeiture could be made on account of non-payment of installment of interest, was in full force when D. B. Phillips, under whom plaintiff claims, purchased this land, and this act was a part of and entered into the contract of purchase between the State of Texas and said Phillips, and the act of the legislature of Texas, page 39 of said acts, which took effect 20th August, 1897, or any other act that attempts to forfeit the right of Phillips and those under whom he claims, in a summary manner, as is shown in this cause, without a day in court, is unconstitutional and void and is prohibited by the Constitution of the United States, which provides that no State shall pass any law that impairs the obligation of a contract, and plaintiff contends that this act of 1897, under which this forfeiture was attempted to be made, violates section 10 of the Constitution of the United States, because it is a law impairing the obligation of the contract between D. B. Phillips and the State, and plaintiff succeeds to the rights of D. B. Phillips to the land.

W. W. FLOOD,
A. A. HUGHES,
F. P. M'GHEE,
Att'ys for Pl'ff.

Filed Sept. 29th, 1898.

W. B. TOWNSEND, *Dist. Clk.*
By C. P. SMITH, *Dep.*

6 *Order Overruling Motion for New Trial.*

W. T. WAGGONER
vs.
J. M. FLACK. } No. 1394.

SEPT. 29TH, 1898.

This day came on to be heard plaintiff's motion for a new trial, and the court doth overrule same. To this action of the court plaintiff duly excepted and in open court gave notice of appeal to the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, Texas, and on application of plaintiff ten days are allowed him in which to prepare, have approved, and filed a statement of facts herein.

Statement of Facts. Filed Oct. 5, 1898.

In District Court, Wilbarger County, Texas, September Term, 1898.

W. T. WAGGONER
vs.
J. M. FLACK. } No. 1394.

We, the attorneys for the plaintiff and defendant, agree that the facts in this case are:

That D. B. Phillips, under the act of 1883 as modified by act of Feb'y 23rd, 1885, on 30th of October, 1885, made application, in compliance with the ruling of the State land board of Texas, to purchase the land in controversy, and that said land was duly awarded to him in November, 1885, and that in November, 1885, said Phillips actually settled upon said land in compliance with his said application and cultivated a portion of same during the spring and summer of 1886; that he actually settled on the land in compliance with the law, and that all irregularities in sale of same by land board were validated by acts of 1889, 1891 of the legislature of Texas; that plaintiff is owner of this D. B. Phillips interest in said land by means of conveyances duly executed; that the
7 land was awarded to D. B. Phillips at $2.00 per acre on 30 years' time and interest at five per cent. per annum on all deferred payments; that $\frac{1}{20}$ of the principal on the D. B. Phillips purchase on contract of purchase was paid by him, and all interest payments have been made by him or those claiming under him up to 1st day of January, 1893; that no interest was thereafter paid on said purchase; that on 16th day of December, 1897, J. E. Lutz had City National Bank of Austin, Texas, said Lutz acting as agent for plaintiff Waggoner, to tender the state treasurer $286.95, to pay up the back interest due on said section, and wrote a letter to commissioner of general land office, dated Dec. 15th, 1897, asking the reinstating of the account of D. B. Phillips, and forwarded the transfers or deeds or copies of same showing a chain of title from D. B. Phillips to plaintiff Waggoner, and said transfers were filed by the commissioner of general land office in his office, but commissioner refused to reinstate on the ground that the rights of defendant J. M. Flack had intervened.

J. M. Flack claims as follows: The land was forfeited for non-payment of interest by the commissioner of the general land office of the State of Texas, without any judicial procedure or suit in court, on the 20th day of August, 1897. The land was appraised by the commissioner's court after its forfeiture at $1.00 per acre, and such reclassification approved by the commissioner of general land office, and the list of forfeited lands for resale, including the section in controversy, was filed by Co. clerk of Wilbarger county on 15th day of September, 1897, and recorded by said clerk, in the book kept by him for that purpose, on 16th day of September, 1897. J. M. Flack, on the 17th day of Nov., 1897, made his application in due

form to purchase this land as additional land, he then owning a half section of school land within 1 mile of this land, on which he was then living with his family, as required by law. On this application the land was awarded to J. M. Flack, defendant, in March,
1898, on his application above mentioned, dated Nov. 17th,
8 1897. The sale to J. M. Flack, dat*ing* Nov. 17th, 1897, the application, and the obligation for the balance of the purchase-money being in due form of law, *and* were accepted by the commissioner of the general land office, and the land was awarded to defendant by said commissioner on defendant's aforesaid application. On 13th day of August, 1898, after this suit was brought, but before filing his amended petition, plaintiff, through his att'y, F. P. M'Ghee, made written application to have the D. B. Phillips account for purchase of this land reinstated, and for this purpose tendered the state treasurer of Texas, to pay up the back interest, the sum of $345.25, which application was rejected by commissioner on the grounds of the intervening rights of defendant J. M. Flack. The amount of interest per annum on the D. B. Phillips obligation, at 5 per cent. per annum, is $61.87, and said sum of $345.25 was a sufficient sum to pay up back interest to date of the application of plaintiff's att'y, M'Ghee, to reinstate, to wit, up to 13th Aug., 1898. On these facts the legal contention arises as to who has the better title to the land in suit.

A. A. HUGHES,
W. W. FLOOD, AND
F. P. M'GHEE,
Att'ys for Plaintiff.
J. A. LUCKY,
Att'y for Defendant.

The foregoing statement of facts examined, approved, and ordered filed this Oct. 3rd, 1898.

G. A. BROWN,
District Judge.

Filed Oct. 5th, 1898.

W. B. TOWNSEND, *Dist. Cl'k,*
By C. P. SMITH, *Dep.*

9 *Appeal Bond. Filed Oct.* 13, 1898.

W. T. WAGGONER vs. J. M. FLACK ET AL. } No. 1394. Suit Pending in the District Court of Wilbarger County, Texas, Sept. Term, 1898.

Whereas in the above numbered and entitled cause, pending in the district court of Wilbarger county, Texas, and at a regular term of said court, to wit, on the 29th day of September, A. D. 1898, the plaintiff, W. T. Waggoner, having before trial on said day dismissed his suit herein as to one of the defendants, to wit, F. M. Flack, as appears of record in said judgment, and a jury being waived, the

court on said day rendered its judgment against the plaintiff, W. T. Waggoner, and in favor of the defendant J. M. Flack as follows:

"It is therefore considered, ordered, and adjudged by the court that the plaintiff, W. T. Waggoner, take nothing by his suit herein, and that the defendant J. M. Flack be quieted in his title and possession of the land and premises in suit herein and described as follows, to wit: Situated in Wilbarger county, Texas, and being all of section No. 60, in block No. 4, H. & T. C. R'y Co.'s surveys in Wilbarger county, Texas, surveyed for the common-school fund by virtue of certificate No. 1048, issued to said R. R. Co., and for which he may have his writ of possession.

"It is further ordered that the plaintiff pay all costs in this behalf incurred, for which execution may issue to collect the same."

From which said judgment the said W. T. Waggoner, plaintiff, as aforesaid, has taken an appeal to our court of civil appeals for the second supreme judicial district of Texas, and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, the said W. T. Waggoner, appellant, as principal, and T. M. Holt and J. H. Housels, as sureties, acknowledge ourselves bound to pay to J. M. Flack, appellee, the sum of eight hundred dollars, a sum at least double the amount of costs of the suit in the court of civil appeals, supreme court, and the court below, as estimated by the clerk, conditioned that the said W. T. Waggoner, appellant, shall prosecute his appeal with effect and shall pay all costs which have accrued in the court below (the district court of Wilbarger county, Texas) and which may accrue in the court of civil appeals and the supreme court in said cause, and further conditioned that the appellant, W. T. Waggoner, shall, in the case the judgment appealed from is affirmed, pay to the appellee J. M. Flack the value of the rent or hire of the land in suit in any suit which may be brought therefor.

Witness our hands this 8th day of October, 1898.

W. T. WAGGONER, *Principal*,
By F. P. M'GHEE, *His Att'y.*
T. M. HOLT.
J. H. HOUSELS.

I have fixed probable amount of costs in this cause in district court, court of civil appeals, and supreme court at one hundred and twenty-five dollars, and have approved this bond this 13th day of October, 1898.

Approved this 13th day of October, 1898.

[L. S.]

W. B. TOWNSEND, *Dist. Clk*,
By C. P. SMITH, *Dep.*

Filed October 13th, 1898.

W. B. TOWNSEND, *Dist. Clk*,
By C. P. SMITH, *Dep.*

Assignment of Errors. Filed Oct. 13, 1898.

W. T. Waggoner vs. J. M. Flack. } No. 1394. Suit Pending in the District Court of Wilbarger County, Texas, Sept. Term, 1898.

Now comes W. T. Waggoner, appellant herein, and submits and assigns the following as errors committed on the trial of said cause in the district court of Wilbarger county:

1st. There was error in the judgment of the court for the defendant (the appellee herein) in this: The application and file
11 on the land in controversy by D. B. Phillips (under whom appellant claims) was made and accepted at a time when the law vouchsafed to him that no summary forfeiture of his purchase could be made by the commissioner of the general land office, as had heretofore been authorized, nor by any other person, for failure to pay interest on his obligation to purchase, and the subsequent act of the legislature under which the commissioner of the general land office sought to make and did make a summary forfeiture of the land in controversy for failure to pay interest on his purchase, and under which the application to purchase and file of the appellee was made and accepted, is void in that it contravenes the Constitution of the United States wherein it inhibits any State from passing any law impairing the obligation of a contract, as well as the constitution of the State of Texas in same respect.

2nd. There was error in the judgment of the court for the defendant in this: The commissioner of the general land office had no authority under the law to declare a forfeiture of the obligation to purchase the land in controversy by D. B. Phillips at the time the same was done.

3rd. There was error in the judgment of the court for the defendant in this: The appellant, as the legally authorized claimant of the land in controversy under D. B. Phillips, tendered to the treasurer of the State of Texas the interest on his obligation to purchase, then past due, within the time allowed him by law, and was thereby entitled to have the account of the said Phillips reinstated, and no legal intervening right could have been acquired in the meantime.

4th. There was error in the judgment of the court for the defendant in this: In the obligation to purchase the land in controversy by D. B. Phillips time was not of the essence of the contract, and no valid rescission of the contract could have been summarily made by the commissioner of the general land office in such case
12 as was attempted to have been done by the commissioner in declaring said contract forfeited and placing the land again on the market for sale.

5th. There was error in the judgment of the court for the defendant in this: Because if the time had been of the essence of the contract in this obligation to purchase the land in controversy by D. B. Phillips, in the failure to pay the interest thereon at stipulated periods, same had been waived in extending the time in which such

payment was to be made, and in such case there could have been no valid rescission of such contract in the summary method attempted by the commissioner of the general land office in this behalf.

F. P. M'GHEE,
FLOOD, HUGHES & FOSTER,
Att'ys for Appellant, W. T. Waggoner.

6th. There was error in the judgment of the court for the defendant in this: The commissioner of the general land office could not legally forfeit this purchase, because 1st of Nov., 1897, had not arrived, but same was attempted to be made on the 20th of August, 1897. This act of the legislature is unconstitutional and void, being contrary to the Constitution of the United States, as above stated, and plaintiff made his written application to reinstate D. B. Phillips' account and tendered the treasurer all sums due up to date of tender.

F. P. M'GHEE,
FLOOD, HUGHES & FOSTER,
Att'ys for Appellant, W. T. Waggoner.

Filed Oct. 13th, 1898.

W. B. TOWNSEND, *Dist. Cl'k,*
By C. P. SMITH, *Dep.*

13 *Bill of Costs.*

Filing & dock. cause	.35
Appearances	.45
1 cit. & 2 copies	2.25
Fil. int'*ys* to A. J. Baker	.15
2 cert. copies int'*ys* to Baker	3.40
2 precepts to serve same	2.25
Fil. cross-int'*ys* to B	.15
Cert. copy D. & cross	2.50
1 com	.75
1 cit. & copy to J. M. Flack	1.50
Com. to take dep. J. M. F	.75
Fil. int'*ys* above	.15
Ent. judgment	1.00
Assessing damages	.50
Taxing costs & copy	.25
Fil. & dock. motion	.35
Order on motion	.75
Fil. & dock. motion for new trial	.35
Order O. R. motion	.75
1 aff. and seal	.50
1 subp. and 1 add. name	.40
Fil. statement of facts	.15
Swearing 4 witnesses	.40
Fil. answer	.15
Fil. 19 papers	2.85
Transcript	8.35

Fil. brief	.15
Cert. of brief filed	.75
Fil. & approving appeal bond	1.65
	$33.95

Sheriff's Costs.

1 citation and mil	3.10
One precept & mil	2.60
2 wit. & mil	1.10
	$6.80

Witness Fees.

J. T. Estes	2.80

Notary Fee.

J. E. M. Hedley	1.50

Recapitulation.

Clerk	33.95
Sheriff	6.80
Witness	2.80
Notary	1.50
Total	$45.05

Clerk's Certificate.

THE STATE OF TEXAS, }
County of Wilbarger. }

I, W. B. Townsend, clerk of the district court in and for Wilbarger county, Texas, do hereby certify that the above and
14 foregoing transcript contains a true and correct copy of all the proceedings had in the case of W. T. Waggoner *vs.* J. M. Flack, cause No. 1394 on the docket of said court, and that the above is a true and correct bill of costs in said cause.

Given under my hand and seal of office, at town of Vernon, Texas, this the 27th day of October, 1898.

[L. S.]

W. B. TOWNSEND,
Clerk of District Court, Wilbarger County, Texas,
By C. P. SMITH, *Deputy.*

Indorsement on Transcript.

The foregoing transcript is indorsed as follows: No. 3206. W. T. Waggoner, appellant, *vs.* J. M. Flack, appellee. From the dist. court of Wilbarger county. Applied for by F. P. McGhee, attorney for appellant, on the 26th day of Oct., 1898, and delivered to F.P. McGhee on the 27th day of Oct., 1898. W. B. Townsend, clerk dist. court, Wilbarger county. Filed in court of appeals at Ft. Worth, Texas, the 3rd day of Dec'b'r, 1898. W. L. Huff, clerk court of appeals.

Order of Submission in Court of Civil Appeals.

April 8, 1899.—Cases submitted:
3201, A. J. Anderson *vs.* S. A. Sessions.
3203, Montague Co. *vs.* I. A. Meadows, guar.
3204, Hurlbut & Jones *vs.* W. H. Bush.
3205, Tex. & Pac. R'y Co. *vs.* Truesdale & Gardner.
3206, W. T. Waggoner *vs.* J. M. Flack.
3163, Morgan Jones, rec'r, *vs.* John D. Roach.
3160, C. B. Quaid *vs.* L. D. Tipton.

15 *Answer of Supreme Court to Certified Questions.*

W. T. WAGGONER *vs.* J. M. FLACK. } No. 794. Certified Questions from Second District.

The court of civil appeals for the second supreme judicial district has certified to this court the following statement and questions:

"The section of school land in controversy was first sold in November, 1885, at $2 per acre and on thirty years' time, to D. B. Phillips, who transferred his right to appellant. The law was complied with in this purchase and all interest paid to January 1, 1893. On August 20, 1897, no further payments having been made, the commissioner of the general land office entered a forfeiture for non-payment of interest, and after reclassification and appraisement at $1 per acre, in September, 1897, again put the land upon the market. In November following appellee made application to purchase it as an actual settler upon another piece of school land within the prescribed radius, complying in all things with the law. Consequently, in March, 1898, the land was awarded to him. In the judgment appealed from, the action of the commissioner in declaring the forfeiture and in awarding the land to appellee was approved, and the recovery of the land sought by appellant was denied.

"We therefore deem it advisable to certify to your honors for decision the question whether or not, under any law in force on August 20, 1897, the commissioner of the general land office, at any time before November, 1897, was authorized to declare a forfeiture for the non-payment of interest due since the year 1894; that is to say, whether or not the forfeiture act of 1897 (Acts of 1897, p. 39), which went into effect August 20, 1897, authorized any forfeitures until after the first of November of that year; and, if it did not, then whether its enactment had the effect to repeal section 11 of the law of 1895, so as to prevent a forfeiture, as provided in that section, for interest falling due and remaining unpaid during the
16 years 1894, 1895, or 1896."

The act of the legislature entitled "An act to authorize the commissioner of the general land office to forfeit all lands heretofore sold by the State, under any of the various acts of the legislature, for failure to pay any portion of the interest thereon," approved March 25, 1897 (Gen. Laws 1897, p. 39), empowered the commissioner of

the general land office to declare forfeiture of any sales of the public-school lands made before the passage of the act, if any portion of the interest theretofore due upon the first day of November of any year remained unpaid, and also to declare such forfeiture in case any portion of the interest on such sales which might become due on the first day of any succeeding November should remain unpaid. In other words, this law applies only to lands sold prior to its enactment, but embraces payments of interest already due, as well as those to become due on such sales.

It is declared in the act that it is cumulative; hence it does not conflict with any other law upon this subject, but was intended to supply an authority claimed not to exist as to some of the sales, by covering the whole field from the beginning of such sales down to the date of the law. The emergency clause reads as follows: "The fact that the authority of the land commissioner to make forfeitures of land without judicial ascertainment has been questioned, and the fact that there are now more than ten thousand purchases which can be forfeited under the law for non-payment of the interest due thereon, and the further fact that it is almost impossible and certainly impracticable to institute so many different suits against so many different purchasers, creates an imperative public necessity requiring the suspension of the rule providing that bills be read on three several days, and the same is hereby suspended." The declared necessity for the law shows that its purpose was to dispel any doubt of the power of the commissioner to enforce the State's right to forfeit all sales theretofore made, and by explicit terms to
17 authorize the commissioner to enforce the existing rights of forfeiture for a failure to pay interest which had accrued anterior to the passage of the law, as well as for that which might accrue at a date subsequent to its enactment. This law does not repeal the eleventh section of the general law of 1895 upon the same subject.

T. J. BROWN,
Associate Justice.

Opinion delivered May 22, 1899.

CLERK'S OFFICE SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing two pages contain a true and correct copy of the opinion of the supreme court of Texas in cause No. 794, entitled W. T. Waggoner *v.* J. M. Flack (certified questions from 2nd district).

Witness my hand and the seal of said court this the 17th
[L. S.] day of June, A. D. 1899.

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy.*

MAY 22ND, 1899.

W. T. WAGGONER vs. J. M. FLACK. } No. 794. Certified Questions from Second District.

Opinion delivered by Associate Justice Brown:

"It is ordered by the court that a copy of the opinion herein delivered be certified to the court of civil appeals for the second supreme judicial district, and that said cause be therein proceeded with in accordance with said opinion."

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the order
18 made by the supreme court in the above styled and numbered cause.

Witness my hand and the seal of said court this the 17th
[L. S.] day of June, A. D. 1899.

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

Filed in court of civil appeals June 19, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Certified Copy of Bill of Costs in Supreme Court.

CLERK'S OFFICE, SUPREME COURT.

W. T. WAGGONER vs. J. M. FLACK. } No. 794. Willbarger Co. Certified Copy Bill of Costs in Supreme Court.

Filing record	.50
Docketing cause	.50
Entering appearances	.50
Filing briefs, 2	.60
Filing 1 extra papers	.30
Entering judgment	1.00
Taxing costs	.50
Certified copy of bill of costs	1.00
Recording opinion	1.50
Certified copy of opinion	1.50
Orders	1.00
2 notices to counsel	2.00
Cert. copy judg. to C. C. A	1.00
Total	$11.90

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin, [L. S.] this the 17th day of June, 1899.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals June 19, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

19 *Opinion of Court of Civil Appeals.*

W. T. WAGGONER, Appellant,
vs.
J. M. FLACK, Appellee. } No. 3206.

From the district court of Wilbarger county.

Conclusions.

The section of school land in controversy was first sold in November, 1885, at $2 per acre and on thirty years' time, to D. B. Phillips, who transferred his right to appellant. The law was complied with in this purchase and all interest paid to January 1, 1893. On August 20, 1897, no further payments having been made, the commissioner of the general land office entered a forfeiture for non-payment of interest, and, after reclassification and appraisement at $1 per acre, in September, 1897, again put the land upon the market. In November following appellee made application to purchase it as an actual settler upon another piece of school land within the prescribed radius, complying in all things with the law. Consequently, in March, 1898, the land was awarded to him.

Appellant made two attempts to have the original purchase reinstated, one in December, 1897, and the other pending this suit, tendering in each instance the arrears of interest, but both offers were rejected by the commissioner because of the intervening rights of appellee.

It is thus seen that this case comes within the scope of the decision of our supreme court in the case of Fristoe *v.* Blum, 45 S. W. Rep., 998. True, the sale in that case was made under the law of 1883, which contained a forfeiture clause, but which clause, it is contended, had been repealed when the original sale in this case was made, in November, 1885; but in the opinion referred to this differ-
20 ence was treated as immaterial, as the decision was expressly placed upon the ground that it was within the power of the legislature to authorize the commissioner of the land office to declare forfeitures for non-payment of interest in all such cases without reference to the law under which the rights of purchasers accrued. We are therefore constrained by the opinion of our supreme court in Fristoe *v.* Blum to overrule the main contention of appellant in this case.

The contention that he was entitled to have a reinstatement of the original purchase is overruled by article 4218*f* of the act of 1897, page 185, 2 Sayles' Civil Statutes of 1897, which authorizes the com-

missioner of the land office to make such reinstatement only in cases where "no rights of third persons may have intervened."

The further contention that the forfeiture was invalid is overruled by the opinion of our supreme court on the question certified in this case.

The judgment is affirmed.

STEPHENS,
Associate Justice.

Filed in court of civil appeals June 24, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Judgment of Court of Civil Appeals.

W. T. WAGGONER vs. J. M. FLACK. } 3206. From Dist. Court, Wilbarger County.

Opinion by Mr. Stephens, A. J.

JUNE 24, 1899.

This cause came on to be heard on a transcript of the record, and, the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is therefore considered, and so ordered, adjudged, and decreed, that the judgment of the court
21 below be in all things affirmed; that the appellant, W. T. Waggoner, and his sureties, T. M. Holt and J. H. Housels, pay all costs in this behalf expended, and that this decision be certified below for observance.

Motion for Rehearing.

In the Court of Civil Appeals, Second Supreme Judicial District, Fort Worth, Texas.

W. T. WAGGONER, Appellant, vs. J. M. FLACK, Appellee. } No. 3206.

Appealed from the district court of Wilbarger county, Texas.

Appellant's Motion for Rehearing.

Now comes the appellant, W. T. Waggoner, and moves the court to set aside the judgment rendered in this cause on the 24th day of June, 1899, and grant him a rehearing herein for the following reasons, to wit:

I.

Because the court erred in overruling appellant's 1st assignment of error, to the effect that the forfeiture made by the commissioner of the general land office in August, 1897, is void, in that it contravened the Constitution of the United States, which inhibits any

State from passing any law impairing the obligation of a contract, as well as the constitution of the State of Texas to the same affect, because this land was purchased from the State of Texas under the law regulating the sale of school land, enacted in 1885, which expressly provides that in any sales of school land made under that law no forfeiture should be allowed for failure to pay interest, and the act of 1887 and all other acts authorizing the land commissioner to forfeit the sale of school lands for the non-payment of interest, passed subsequent to the act of 1885, would impair the obligation of all contracts of sale made under the acts of 1885, and there-
22 fore, in so far as it relates to sales made under said act, said laws are unconstitutional and void.

II.

Because the court erred in not sustaining appellant's second assignment of error to the effect that the commissioner of the general land office had forfeited the land in controversy for failure in the payment of interest at a time when he was not authorized by law to do so, because the act of 1897 gave appellant until the 1st of November to pay all interest in arrears, and only provided for a forfeiture for the non-payment of interest after the 1st of November, 1897, when this forfeiture was made in August, 1897.

III.

Because the court erred in not sustaining appellant's 3rd assignment of error, to the effect that the appellant tendered to the treasurer of the State of Texas past-due interest within the time allowed by law, and therefore no rights of third parties could have intervened, because appellant did tender all interest in arrear within the 90 days given him by law.

IV.

Because the court erred in not sustaining appellant's 4th assignment of error, to the effect that since time was not the essence of the contract of sale by the State of the land in controversy, the State had no right to rescission or forfeiture, and the act of 1887 could give the State no such right without impairing the obligation of contract-, because the acts of the legislature of 1885 regulating the sale of school lands expressly provided that the time for payment of interest was not the essence of contract, and unless time is of the essence of the contract no right of rescission or forfeiture exists in the vendor, and therefore, in so far as applied to this sale, the law authorizing rescission would be invalid because it would impair the obligation of contract made between Phillips and the State.

23 V.

Because the court erred in not sustaining appellant's 5th assignment of error, to the affect that the State had waived its right by extending the time for the payment of the annual installments of interest, because the State, since the year 1893, when default of in-

terest was made on the land in controversy, has repeatedly extended the time for the payment of said interest and thereby waived its right of forfeiture.

VI.

Because this court erred in holding that the opinion of the supreme court in Frist-e *vs.* Blum is decisive of the question in this case, since in that case the court held that the right of rescission existed in the State at all times, and that the subsequent acts of the legislature only authorized the commissioner of the general land office to carry that right into effect. In this case, as no right of rescission exists under the contract, the legislature had no authority to confer that right upon the land commissioner.

W. W. FLOOD &
A. A. HUGHES,
Att'ys for Appellant.

Filed in court of civil appeals July 7, 1899.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Order on Motion for Rehearing.

W. T. WAGGONER
vs.
J. M. FLACK. } 2915, 3206.

OCTOBER 14, 1899.

This day came on to be heard the motion of appellant for a rehearing in this cause, which, having been heard and considered by the court, is overruled.

24 *Application to Supreme Court for Writ of Error.*

In Supreme Court of Texas.

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error. } In the Supreme Court of the State of Texas.

Application for writ of error.

To the honorable supreme court of the State of Texas:

Now comes W. T. Waggoner, who resides in Wise county, Texas, and herein styled plaintiff in error, and prays this court for a writ of error to the court of civil appeals for the second supreme judicial district of Texas in a cause lately pending in said court, wherein the above-named party was appellant and J. M. Flack, who resides in Wilbarger county, Texas, was appellee (whose attorney, J. A. Lucky, resides in Vernon, in said county), and who herein will be styled defendant in error, and as ground therefor would respectfully show:

That the plaintiff in error, on the 27th day of April, 1898, instituted suit in the district court of Wilbarger county, Texas, to recover from the defendant in error section No. sixty, in block No. four, H. & T. C. R'y Co. survey, in Wilbarger county, Texas, located by virtue of certificate No. 1048, and surveyed for common-school purposes; that one D. B. Phillips made application to purchase said land, and that same was awarded to him and settled thereon as was required, and after three years' residence sold to plaintiff in error. The aliquot proportion of principal required was paid and obligation stipulating for deferred payments of principal and interest entered into. This interest was regularly paid up to January, 1893, and since then none has been paid; but later there was a tender to pay this overdue interest. For this default the commissioner of the general land office sought to forfeit or rescind this contract of purchase on the 20th day of August, 1897, and in pursuance thereof the defendant in error made his file and application to purchase same, and the land was awarded to him; and the plaintiff in error contended that the act of the legis-
25 lature authorizing forfeiture when applied to this particular case was invalid. Mainly on this contention trial was had, and there was judgment rendered for the defendant in error. Tr., p. —. From this judgment the plaintiff in error appealed to the court of civil appeals for the second supreme judicial district and gave proper bond. Tr., p. —. Errors were assigned, and the case was duly and properly briefed in said court, and copies of said briefs containing the several errors assigned accompany this application; that, notwithstanding the errors that were pressed on the attention of the court of civil appeals in said brief, the said court affirmed the judgment of the trial court. A copy of this judgment of affirmance of the court of civil appeals and the opinion of the court, with its conclusions of law and fact, accompany this application. A motion for rehearing, especially calling the attention of the court of civil appeals to the errors hereinafter shown and complained of, was filed and submitted in said court in time, and a copy thereof is hereto appended.

There was an order refusing and overruling said motion, a copy of which also accompanies this application.

The plaintiff in error would respectfully show to this court that there are errors arising on questions of law, and that were material to the true and rightful determination of this cause, which led to and caused the judgment of the lower court and court of civil appeals, and they are in the main in the following particulars:

1st. In not concluding and holding as matter of law that the forfeiture made by the commissioner of the general land office in August, 1897, was void, in that it contravened the Constitution of the United States, which inhibits any State from passing any law impairing the obligation of a contract, as well as the constitution of the State of Texas to the same effect, because this land was pur-
chased from the State of Texas under the law regulating the
26 sale of school lands, enacted in 1885, which expressly provides that in any sales of school land made under that law

no forfeiture should be allowed for failure to pay interest, and the act of 1887 and all other acts authorizing the land commissioner to forfeit the sale of school lands for non-payment of interest, passed subsequent to the act of 1885, would impair the obligation of all contracts of sale made under the acts of 1885, and therefore, in so far as it relates to sales made under said act, said laws are unconstitutional and void.

For statement and for ready reference hereunder it may be said that the purchase of the land in controversy was made in November, 1885. The forfeiture was made on August 20th, 1897. See conclusions of court of appeals.

Acts 1883, p. 85, sect. 10.
Acts 1885, p. 13, sect. 9 & 10, approved Feb'y 16, 1885.
Acts 1885, p. 18, sect. 1, approved Feb'y 23rd, 1885.

The court of appeals was constrained to overrule this assignment by the opinion of this court in the case of Fristoe v. Blum, in 45 S. W. R., and claims it was there held it was within the power of the legislature to authorize the commissioner of the general land office to declere forfeitures for non-payment of interest in all such cases, irrespective of the law under which the rights of purchasers accrued.

It is true in that case the language is strong and broad in its scope and seems to strike hip and thigh everything that comes within its range, but we cannot believe it was intended thereby to forecast every case that might possibly arise under the many enactments on that subject and prescribe a formula by which every case should be measured, irrespective of the facts out of which it might arise. The facts, and consequently the reasoning, in that case we do not think apply to the case at bar. Our purchase was made in November, 1885, and the forfeiture had on the 20th day of August, 1897, the very day the act of that year went into effect. This act of the 23rd of February, 1885, which was the law in existence at the time our purchase was made, in November, 1885, prohibited
27 the forfeiture for failure to pay annual installments of principal or interest prior to the 1st of August after the same became due, and said failure to pay same "shall not cause a forfeiture of the rights of such holder in such land." This is entitled "An act to prevent the forfeiture of the rights of purchasers of public-school lands." Its language is plain. It cannot mean less.

When read in the light of the preceding act of February 16th, 1885, it is manifest the legislature could not have intended otherwise.

This act provided, and only seven days preceding the one above mentioned, that one-thirtieth of the principal shall be paid on the first day of each succeeding year, and interest, at the rate of five per cent., on the whole unpaid purchase-money from date annually, on or before the first of March of each year, and in the same section (nine) provided: "That if the payment of the annual installments of interest be made by the first of August succeeding the first day of March, when same became due, then no forfeiture shall result or be

taken for such delay." Then, to make matters doubly sure, the former act made the failure to pay principal or interest within the time named not only no ground for forfeiture, but declared such failure shall not cause a forfeiture of the rights of such holder.

So we insist the right to rescind in our case did not exist, and any subsequent law, though it pertained to the remedy, if it impaired the right, as it clearly would do in this case, it is equally obnoxious to the constitution. Bronson *v.* Kinzie, 1 How., 322. In fact, the same was held by this court on this question. Loan Association *v.* Hardy, 26 S. W. R., 497.

The act of 1883 (page 88, section 10) made no such inhibition to the purchasers thereunder, but simply declared, if on the first day of March of any year the interest due remains unpaid, the
28 custodian of the obligation shall endorse thereon, "Lands forfeited." So the repeal of that law left the common-law right to rescind in force, and it only remained for the legislature to designate some officer to carry into effect that right, and this was done by the act of April first, 1887.

So, bearing in mind that the act of 1883, under which the purchase was made in the Fristoe case, had no provision forbidding forfeitures, whilst the act of February 23rd, 1885, under which the purchase in the case at bar was made, did have, and was made imperative, the contrast between the two cases is patent and the substantial rights thereunder distinct; nor do we believe it can be gainsayed but that the latter case comes clearly within the constitutional inhibition for which we contend.

2nd. In not concluding and holding as matter of law that the commissioner of the general land office had forfeited the land in controversy for failure in the payment of interest at a time when he was not authrized by law to do so, because the act of 1897 gave appellant until the first of November to pay all interest in arrears, and only provided for the forfeiture for the non-payment of interest after the first of November, 1897. Acts of 1897, page 39. This act took effect on the 20th of August, 1897, the day the forfeiture herein was made, and extended time to first of November. The right to rescind on the 1st Nov., 1896, under the act of 1895, was waived by failure to exercise the right in reasonable time, and hence the right could only be exercised under act of 1897, and then, under holding of this court, this was prematurely done, viz., on 20th Aug., 1897, and day this act went into effect. Acts of 1895, page 67. This extends time to Nov. 1.

3rd. In not concluding and holding as matter of law that the plaintiff in error had tendered to the treasurer of the State of Texas past-due interest within the time required by law, and that no rights of third parties could have intervened, since all the interest
29 in arrear had been tendered within the ninety days given by law.

Acts 1897, art. 4218*f*, p. 184.
Acts 1897, p. 39.

4th. In not concluding and holding as matter of law that, as time

was not of the essence of the contract of sale, by the sale of the land in controversy the State had no right to rescind the contract summarily, and the act of 1887, nor any other act, could give the State any such right without impairing the obligation of the contract, because the acts of the legislature of 1885 regulating the sale of school lands expressly provided that the time for payment of interest was not of the essence of the contract, and only in cases where time is of the essence of the contract does the right of summary rescission vest in the vendor, and therefore, in so far as applied to this sale, the law authorizing rescission would be invalid, as it would impair the obligation of the contract between Phillips and the State.

5th. In not concluding and holding as matter of law that the State had waived its right to summary rescission by extending the time for payments of the annual installments of interest, because the State since the year 1893, when default was first made in the payments of interest on the land in controversy, has repeatedly extended the time for the payment of said interest, and thereby waived the right to summary rescission.

We beg to refer the court to the brief accompanying this application for authorities under the last two assignments, and, in addition to the argument therein presented, invite the court's attention to some additional authorities on the question of summary rescissions of contracts and waivers of that right when not promptly exercised. In the case of Tom *v.* Wollhoefer, 61 Texas, 281, Judge Willie, delivering the opinion, says: "The vendor's remedy by rescission is a harsh and stringent one, especially when a part of the consideration has been paid and it is sought to forfeit the payment and recover or resell the land; hence slight circumstances are seized upon to protect the vendee against the forfeiture of the amount paid or compel the vendor to seek redress by suit for the balance due upon the purchase-money. He must not delay too long in insisting upon the payment of the money as it falls due, or he will be considered as having waived the default." The record herein shows a perfect compliance with the law up to 1893. That part of the principal required was paid, and the annual installments of interest for five years, up to 1893, was paid regularly, and, in addition, there has been tender of the full amount remaining due. There *has* been constant extensions of time in these payments by the State, and hence, in the light of this case, a waiver of the summary right to rescind, and would certainly at least have entitled the vendee to demand and notice. When the vendee has paid part of the purchase-money and given his notes for the balance, it is a familiar, equitable rule, before the vendor can rescind he must return or offer to return money paid.

In Phillips *v.* Hearndon, 78 Tex., 378, it was held: In contract for sale of land, when the vendee has paid part of the purchase-money, the vendor must give the vendee notice before revoking the contract.

When there has been part performance by the vendee, as paying portion of the purchase-money or taking possession and making improvements under the contract, he is entitled to reasonable notice of

the vendor's intention to rescind. Kennedy *v.* Embry, 72 Tex., 390.

The remedy for rescinding an executory contract is not favored. Slight circumstances may suffice to show a waiver by the vendor of the right. Moore *v.* Gisecke, 76 Tex., 544; Redden *v.* Smith, 65 Tex., 28.

We might multiply authorities indefinitely on this proposition, but it would serve no good purpose if the foregoing are not ample.

31 Whilst we in no manner waive the other assignments in this case and believe we are right in the first contention in this case, yet, should the court not agree with us, we beg respectfully to insist on the application of this doctrine of waiver, &c., in reference to the rescission of executory contract, and we are wholly unable to conceive any good reason why these rules should be applied by this court in ordinary cases and make an exception in this class. The record discloses all the facts to bring this case clearly within these rules, and if it did not, the presumption would be indulged that Phillips, the original purchaser, entered into possession and made improvements thereon—made it his home—as this court judicially knows he was required to do.

And again it must be clear—must be patent—by the tender herein shown to pay all deferred interest that it was by some oversight or mistake that there was failure to pay when the interest matured.

Wherefore we respectfully submit the writ herein applied for ought to be granted and this cause reversed and — rendered for plaintiff in error on such conditions as the court may deem proper to impose.

F. P. McGHEE,
A. A. HUGHES, &
W. W. FLOOD,
Attorneys for W. T. Waggoner, Plaintiff in Error.

CLERK'S OFFICE, SUPREME COURT.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above and foregoing six pages contain a true and correct copy of the original application for writ of error, No. 2442, entitled W. T. Waggoner *vs.* J. M. Flack, from Wilbarger county, second district, and that said application was by said supreme court refused on the 16th day of November, A. D. 1899.

Witness my hand and the seal of the supreme court of
[L. S.] Texas this the 4th day of August, A. D. 1900.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Aug. 8, 1900.

W. L. HUFF, *Clerk.*

32 *Order of Supreme Court Refusing Writ of Error.*

In Supreme Court of Texas, Second District.

W. T. WAGGONER
vs.
J. M. FLACK.

NOV'R 16, 1899.

This day came on to be heard the application of W. T. Waggoner for a writ of error to the court of civil appeals for the second district, and, the same having been duly considered, it is ordered that said application be refused; that the applicant, W. T. Waggoner, and his sureties, T. M. Holt and J. H. Houssels, pay all costs incurred on this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on said application for a writ of error.

Witness my hand and the seal of said court this the 16th
[L. S.] day of November, A. D. 1899.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Bill of Costs in Supreme Court.

W. T. WAGGONER
vs.
J. M. FLACK.
No. 2442. Certified Copy Bill of Costs, Supreme Court.

CLERK'S OFFICE, SUPREME COURT.

Filing application	.50
Docketing petition	.50
Entering appearance of counsel	.50
Filing two briefs	.60
Filing three papers	.90
33 Entering orders	.50
Entering judgment on application	1.00
Certified copy of judgment	1.00
Taxing costs of application	.50
Certified copy of bill of costs	1.00
Total	$7.00

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin,
[L. S.] this the 16th day of November, 1899.

CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Petition for Writ of Error to U. S. Supreme Court.

In the Court of Civil Appeals, Second Supreme Judicial District of Texas.

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error.

Petition for writ of error.

To the Honorable T. H. Conner, chief justice of the court of civil appeals of the second supreme judicial district of Texas, at Fort Worth:

Now comes W. T. Waggoner, hereinafter styled plaintiff in error, and complaining of J. M. Flack, hereinafter designated as defendant in error, with respect shows that plaintiff in error is a resident citizen of Wise county, Texas, and that said defendant in error is a resident citizen of Wilbarger county, Texas, and that his attorney of record herein is J. A. Lucky, who resides in the town of Vernon, in Wilbarger county, Texas.

Plaintiff presents this his application for writ of error from
34 the Supreme Court of the United States to this honorable court, and to show that said Supreme Court has jurisdiction to entertain an appeal herein by writ of error and to determine and consider the several matters complained of in the assignments of error filed herewith, and to further shows that the honorable chief justice of this court has power and authority to grant this application, plaintiff respectfully represents:

That this suit was filed in the district court of Wilbarger county, Texas, by plaintiff in error against defendant in error on the twenty-seventh day of April, eighteen hundred and ninety-eight, and was tried before that court, without a jury, on the twenty-ninth day of September, eighteen hundred and ninety-eight, on which said trial defendant in error prevailed; whereupon plaintiff in error took an appeal upon an agreed statement of facts to the court of civil appeals of the second supreme judicial district of Texas, at Fort Worth, and the same was, after due hearing and submission, decided by said court on the 24th day of June, eighteen hundred and ninety-nine, and so resulted that the judgment of the said district court was affirmed.

Plaintiff in error filed his motion for a rehearing in said court of appeals on the seventh day of July, eighteen hundred and ninety-nine, assigning errors therein, as hereinafter in substance shown and by the record made manifest, and said motion was on the — day of ——, 1899, *was* in all things overruled; that thereafter, and within the time prescribed by law, plaintiff in error presented his

application for a writ of error to the supreme court of the State of Texas, complaining of the errors set forth in said assignment of errors filed herewith, but that said application, on the sixteenth day of November, eighteen hundred and ninety-nine, was refused, and said supreme court of Texas refused to take jurisdiction of this cause, as shown by copy of its judgment filed amongst the papers in this cause.

Plaintiff shows that the decision of the honorable court of
35 civil appeals of Texas was adverse to him, and that said decision was the denial of a right claimed by him under the Constitution and laws of the United States, as shown by the following—

Statement of the Nature and Result of this Cause.

This was an action of trespass to try title, brought by plaintiff against defendant to recover from him section No. 60, block No. 4, H. & T. C. R. R. Co. survey in Wilbarger county, Texas, of the value of $2,500.00.

The land in controversy was a school section properly filed and settled on by D. B. Phillips, who after three years' residence thereon sold to the plaintiff in error. Phillips' application to purchase same was made on 30th November, 1885, and it was duly awarded him. The proper aliquot proportion of principal required by law was paid and obligation stipulating for deferred payments of principal and interest entered into. The interest was regularly paid up to January, 1893, and since then none has been paid, but latterly there was a tender to pay this overdue interest. For this default in the payment of interest and for no other cause the commissioner of the general land office sought to forfeit or rescind this contract of purchase on the 20th August, 1897, and replaced the land again on the market for sale, and in pursuance thereof the defendant in error made his file and application to purchase same, and the land was awarded to him; but by an act of the legislature of Texas enacted on the 23rd day of February, 1885, and which was in full force and had been in no manner changed or repealed when Phillips made his purchase in November, 1885, it was especially provided "that the failure of the holder of any of these lands under contract of purchase from the State to make the annual payments thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the right of such holder in such land."

But by a subsequent act of the legislature the commissioner
36 of the general land office was authorized to make summary forfeitures of these contracts of purchase when the interest had not been paid.

Plaintiff in error, who succeeded to the rights of Phillips, contended that this subsequent act of the legislature, under which a summary forfeiture or rescission of his contract of purchase was sought to be had, could not be applied to his contract, because it would abridge his rights and impair the obligation of his contract made under an act which inhibited such forfeitures, and for that

reason was in conflict with section 10, art. 1, Constitution of the United States.

Plaintiff's contention in this behalf was overruled, as well in the district court as in the court of civil appeals and the supreme court, and, being denied all relief whatever, he complains thereof and says that said errors as set forth in his assignment of errors filed herewith were committed to his prejudice.

Wherefore plaintiff in error prays that a writ of error may be allowed in this behalf to the court of civil appeals of the second supreme judicial district of Texas for the correction of the errors so complained of, and that the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

W. W. FLOOD,
Attorney for Plaintiff in Error, W. T. Waggoner.

In the Court of Civil Appeals, Second Supreme Judicial District.

W. T. WAGGONER, Appellant,
vs.
J. M. FLACK, Appellee.

This the — May came the appellant, by his attorney, and filed herein and presented to the chief justice of this court his petition and praying for the allowance of a writ of error intended to be urged by him, and praying also that the transcript of the record, proceedings, and papers upon which the judgment herein
37 was rendered, duly authenticated, may be sent to the Supreme Court of the United States, at the seat of government, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the appellant, W. T. Waggoner, giving bond accordingly in the sum of five hundred dollars, which may operate as a cost bond.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas.

I, W. L. Huff, clerk of the court of civil appeals of the second supreme judicial district of Texas, do hereby certify that T. H. Conner, whose name is subscribed to the foregoing order, was at the time of subscribing same chief justice of the court of civil appeals of the second supreme judicial district of Texas, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said court, at Fort Worth, Texas, this 8th day of August, A. D. 1900.

W. L. HUFF,
Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas.

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

38 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to J. M. Flack, Wilbarger county, Texas, and J. A. Lucky, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, to be held in the city of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of Texas, at Fort Worth, wherein W. T. Waggoner is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 1st day of August, nineteen hundred, and of the Independence of the United States the one hundred and twenty-fourth.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals,
Second Supreme Judicial District of Texas.

Attest: W. L. HUFF, *Clerk.* [L. S.]

I accept service of the foregoing citation this August 1st, 1900.

J. A. LUCKY,
Attorney of Record for J. M. Flack, Defendant in Error.

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

39 *Assignment of Errors.*

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error.

The plaintiff in error in this cause, in connection with his petition for writ of error to the court of civil appeals for the second supreme judicial district of Texas, makes and submits the following assignment of errors, which he avers occurred upon the hearing of said cause in said court:

1st. In not concluding and holding as a matter of law that the forfeiture of the contract of purchase of D. B. Phillips of the land in controversy, made by the Commissioner of the General Land Office

in August, 1897, was void, in that it contravenes section 10, article 1, Constitution of the United States, which inhibits a State from passing any law impairing the obligation of a contract, because this land was purchased by Phillips from the State of Texas under a law enacted by the State in 1885, which especially prohibited forfeitures of such sales for non-payment of interest, and all legislation subsequent thereto, such as the acts of 1895 and 1897, authorizing such forfeitures for non-payment of interest, would and did impair the obligation of his contract made under this act of 1885.

And hence the act of the legislature of the State of Texas under which the commissioner acted in this particular was unconstitutional and void,

2nd. There was error in the judgment of the court of civil appeals in affirming the judgment of the district court of Wilbarger county, and said judgment should have been in favor of the plaintiff in error herein instead of the defendant in error.

Whereupon the plaintiff in error prays said judgment may be reversed.

W. W. FLOOD,

40 *Attorney for Plaintiff in Error, W. T. Waggoner.*

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Bond.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

W. T. WAGGONER, Appellant,
vs.
J. M. FLACK, Appellee.

Know all men by these presents that we, W. T. Waggoner, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto J. M. Flack in the full and just sum of five hundred dollars, to be paid to the said J. M. Flack, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of June, 1900.

Whereas the above-named appellant has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the court of civil appeals for the second supreme judicial district of Texas:

Now, therefore, the condition of this obligation is such that if the above-named W. T. Waggoner shall prosecute said writ to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

W. T. WAGGONER.
M. B. LOYD.
S. B. BURNETT.

41 The foregoing is hereby approved this 19th day of July, 1900.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals,
Second Supreme Judicial District of Texas.

Filed in court of civil appeals Aug. 9, 1900.

W. L. HUFF,
Clerk 2nd Supreme Judicial District.

Bill of Costs in Court of Civil Appeals.

W. T. WAGGONER
vs.
J. M. FLACK. } No. 3206. From Wilbarger County.

Filing record	.50
Docketing cause	.50
Appearances	1.00
Filing and entering motion	.35
Orders	2.00
Filing papers	2.80
Continuances	.20
Judgment	1.00
Taxing costs	.50
Mandate	1.50
Recording opinion	.75
Cert. copy bill of costs	.70
Certified copy of motion	2.00
Issuing writs	6.00
Issuing precept	1.50
Sheriff's fees	1.00
	$22.30
Costs at Ft. Worth	22.30
Trans. order	1.00
Cost on cert. question	11.90
Cost sup. court	7.30
Ex	.50
	$43.00
Transcript sent Supreme Court of United States	20.00
Total	$63.00

42 *Clerk's Certificate.*

Clerk's office, court of civil appeals, second supreme judicial district.

I, W. L. Huff, clerk of the court of civil appeals for the second supreme judicial district of Texas, hereby certify that the foregoing are true and correct copies of all proceedings had in the district

court of Wilbarger county, in this court, and in the supreme court in the cause of W. T. Waggoner *versus* J. M. Flack, as shown by the records of my office.

Witness my signature and the seal of said court, at office, in the city of Fort Worth, Texas, on this the 13th day of August, A. D. 1900.

[Seal Court of Civil Appeals of the State of Texas.]

W. L. HUFF,
Clerk Court of Civil Appeals,
Second Supreme Judicial District of Texas.

43 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the court of civil appeals for the second supreme judicial district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the second supreme judicial district of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between W. T. Waggoner, appellant and plaintiff in error, and J. M. Flack, appellee and defendant in error, wherein was drawn in question the validity of a statute of said State (and an authority exercised thereunder), on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said W. T. Waggoner, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send said record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the — day of —— next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of July, nineteen hundred.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Ft. Worth.]

J. H. FINKS, *Clerk,*
By J. B. FINKS, *Deputy.*

44 Allowed this 21st day of July, nineteen hundred.

T. H. CONNER,
Chief Justice Court of Civil Appeals, Second Supreme Judicial District of Texas, at Fort Worth, Texas.

Clerk's office, court of civil appeals, second supreme judicial district.

In pursuance of the command of the within writ of error I, W. L. Huff, clerk of the court of civil appeals for the second supreme judicial district of Texas, herewith transmit to the Supreme Court of the United States, at Washington, the record and proceedings therein named, with all things concerning the same.

Witness my signature and the seal of said court, at office, in the city of Fort Worth, Texas, on this the 13th day of August, A. D. 1900.

[Seal Court of Civil Appeals of the State of Texas.]

W. L. HUFF,
Clerk Court of Civil Appeals, Second Supreme Judicial District of Texas.

45 [Endorsed:] W. T. Waggoner, plaintiff in error, *vs.* J. M. Flack, defendant in error. Writ of error. Filed in court of civil appeals Aug. 9, 1900. W. L. Huff, clerk 2nd supreme judicial district.

Endorsed on cover: File No., 17,890. Texas court of civil appeals, 2nd supreme judicial district. Term No., 405. W. T. Waggoner, plaintiff in error, *vs* J. M. Flack. Filed August 27th, 1900.

In the Supreme Court of the United States

October Term, 190

OCTOBER TERM 1909

W. T. WAGGONER, Plaintiff in Error,
vs.
T. H. FLACK, Defendant in Error

No. 458

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas

[illegible]

W. W. FLOOD,
Attorney for W. T. Waggoner

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

W. T. WAGGONER, *Plaintiff in Error,*
vs.
J. M. FLACK, *Defendant in Error.*

No. 405.

In Error to the Court of Civil appeals, for the Second Supreme Judicial District of Texas.

BRIEF FOR W. T. WAGGONER, PIAINTIFF IN ERROR.

This was a suit originally instituted in the District Court of Wilbarger County, Texas, to recover of the defendant in error 640 acres of land and known as Section No. 60, Block No. 4, H. & T. C. R. R. Co.'s Surveys.

It is a school section set apart by the State for common school purposes, but is sold to individuals, under regulations prescribed by law at stipulated

prices, requiring a part of the principal in cash, and annual payments of interest on the remainder.

In the case at bar, this section was sold to D. B. Phillips in November, 1885, at $2.00 per acre, on thirty years time, and interest at five per cent on deferred payments, and one-thirtieth of the principal was paid in cash. And the annual installments of interest was regularly paid up to the 1st day of January, 1893. The plaintiff in error, W. T. Waggoner, acquired title to this section of land by regular conveyances from D. B. Phillips, and these were filed with the Commissioner of the General Land Office, and all of these preliminary matters was in accordance with the law, and no question is made thereon. (Rec. 5.).

The legislature has at its sessions since 1879, been constantly making changes in this law, and especially in regard to the periods when the annual installments of interest shall be paid: in the first instance requiring this payment to be made on the 1st of March, and this time has been variously extended, until now it is fixed on the 1st day of November in each year.

Not only this, but the method of enforcing the performance of these contracts has undergone various changes. At the special Session of the Sixteenth Legislature, 1879 (Acts 1879, p. 26, sec. 12), it was provided that failure to pay this interest the 1st day of March following the maturity of any payment, proceeding should be had by suit, and judgment be had against the purchaser, if he failed to show that the interest had been paid. But latterly, from 1883

down to the present, it has been generally provided that in case of failure to pay interest when due, the custodian of the obligation of the purchaser shall endorse thereon, *lands forfeited*, and there shall be no necessity for judicial ascertainment of the facts of forfeiture (Acts 1883, p. 88, sec. 10).

And one of the contentions in this case in *all of the Courts below*, and the only contention in this Court grows out of the act of the Legislature of Texas of 1885, approved February 23rd, and under which act the original purchaser, D. B. Phillips, bought, and which especially provided that failure to make the annual payments of interest on these obligations prior to the 1st day of August after the same becomes due shall not cause *a forfeiture of the rights of such holder in such land.* It was insisted, both in the District Court of Wilbarger County, and in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and on application for Writ of Error to the Supreme Court of Texas, that any subsequent act of Legislature, as the act of 1887, or 1897, which undertook to authorize a summary forfeiture of the rights to this land of Phillips, or his Vendee, the Plaintiff in Error here, as was sought to be done by the Commissioner of the General Land Office on the 20th of August, 1897, was and did impair the obligation of his contract made in pursuance of this act of the 23rd February, 1885, and that all subsequent laws, authorizing such summary forfeitures, was in conflict with Art. 1 Sec. 10, Constitution of the U. S. And we are now before this Court to press and further urge this contention.

FIRST.

To the acts of 1883, Regular Session of the 18th Legislature, on this subject, pp. 85, 86, 87, 88, entitled an "Act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the common school funds, etc.," and especially the following Sections, viz:

Section 9. The purchaser shall at once pay to the person selling for the State, or to the State Treasurer, as the Board may determine, and within such time as it may fix, one thirtieth of the amount bid, and execute his obligation for the remainder of the purchase money, payable to the State of Texas, and binding the purchaser to pay one thirtieth of the whole price on the first day of each succeeding year until the whole is paid, and interest at the rate of five per cent per annum on the whole unpaid purchase money from date, payable annually on or before the first of March of each year; and provided, that after the expiration of seven years, the purchaser shall have the option to pay the unpaid principal, and providing that a failure to pay the annual installments of principal shall not work a forfeiture until the whole sum is due, etc.

Section 10. If upon the first day of March of any year, the interest due remains unpaid, the custodian of the obligation of the purchaser shall endorse on it "lands forfeited," and the account kept with the purchaser, shall show such failure to pay and such forfeiture; the failure to pay the interest shall *ipso facto* work a forfeiture, and the entry on the account shall be evidence of the fact, and there shall

be no necessity for judicial ascertainment of the facts of the forfeiture, etc."

So stood the law until 1885, when Sections 9 and 10 were amended, and it is only necessary here to notice the amendment of Section 10, which is pertinent to our inquiry and is as follows:

"Section 10. If upon the first day of August of any year, the interest due on the first day of the previous March remains unpaid, the custodian of the obligation of the purchaser shall endorse on it "lands forfeited," and the account kept with the purchaser shall show such failure to pay and such forfeiture: the failure to pay the interest by the first day of August following its maturity shall *ipso facto* work a forfeiture and the entry on his account shall be evidence of the fact, and there shall be no necessity for judicial ascertainment of the facts of the forfeiture, etc." Acts of 1883, pp. 13 and 14, approved February 16th, 1885. And this brings us down

SECOND

To that Act of the Legislature, modifying the act of 1883, and under which the purchase in this case was made, which is as follows:

"An act to prevent the forfeiture of the rights of purchasers of Public Free School, University or Asylum land."

"Section 1. Be it enacted by the Legislature of the State of Texas: That the failure of a holder of Public Free School, University or Asylum land under contract of purchase from the State, to make the

annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land.

Section 2. The near approach of the close of the Session, and the importance of this Bill to many citizens of this State create an imperative necessity and emergency authorizing the suspension of the constitutional rule requiring Bills to be read on three several days, and demanding this act take effect from and after its passage, and it is so enacted. Passed February 19th, 1885. Approved February 23rd, 1885." (Acts of 1885, page 18.)

The application to purchase this section was made by D. B. Phillipps on the 30th of October, 1885, and the same was duly awarded to him in November, 1885, and the Plaintiff in Error is the owner of this interest by conveyances duly executed. (Rec. 5.)

THIRD.

In 1887, the Twentieth Legislature changed very largely the manner of placing these lands on the market, and making sales thereof, but we only desire to call the Courts attention to a part of Section 11, of this act which is as follows:

"Section 11. If upon the first day of August of any year, the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation "land forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon

said land shall be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law, etc ," and it was further provided in this act by

"Section 26. All laws and parts of laws in conflict with this act are hereby repealed, etc." (Acts 1887, Regular Session, pages 87 and 91.)

FOURTH.

But in 1897, the 25th Legislature passed the following act, and under which the forfeiture in this case was had, entitled: "An act to authorize the Commissioner of the General Land Office, to forfeit all lands heretofore sold by the State under any of the various acts of the Legislature, for failure to pay any portion of the interest thereon.

Section 1. Be it enacted by the Legislature of the State of Texas:

That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas, for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the Public Schools, University, or any of the other various State institutions, has not been paid, it shall be the duty of the Commissioner of the General Land Office to endorse on the obligation for said lands, "lands forfeited," and shall cause an entry to that effect to be made on the account kept with such pur-

chaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be re-sold under the provisions of the existing law, or any future law: Provided, the purchaser of said land shall have the right at any time within six months after such endorsement of "lands forfeited," to institute a suit in the District Court of Travis County, Texas, against the Commissioner of the General Land Office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the Commissioner of the General Land Office shall then become fixed and conclusive; provided, that if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death."

This act is cumalative, and is not intended to deny to the State the right to institute any legal proceedings that may be deemed necessary to secure the purchase money or possession of the lands so sold. And this act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the Legislature, under which land may have been sold by the State.

Section 2. The fact that the authority of the Land Commissioner to make forfeitures of land without judicial ascertainment has been questioned, and the fact that there are now more than ten thousand

purchases, which can be forfeited under the law, for non-payment of the interest due thereon, and the further fact that it is almost impossible to institute so many different suits against so many different purchasers, creates an imperative public necessity requiring the suspension of the rule providing that bills be read on three several days, and the same is hereby suspended.

Approved March 25th, 1897. Takes effect 90 days after adjournment."

Acts 1897. Regular Session, p. 39.

The 24th Legislature, at its regular session in 1895, also took a hand at innovation in regard to the sale of these school lands, but Section 2 of this act, which pertains to the forfeiture of these lands for non-payment of interest, and the only part thereof bearing on the matter here, is identical with the Section on the subject, in the act of 1897 above shown, and for that reason is not set out here. But it repealed all laws in conflict with it.

Acts 1895, Regular Session. Sec. 11, p. 67.

I.

Having set out the law under which the purchase in this case was made, and which we contend became a part of the contract of purchase, and the Statutes also, which we insist would impair the obligation of this contract, but especially that of 1897, under which the forfeiture in this case was had.

We come now to present the Error we conceive to have been committed by the Court of Civil Ap-

peals on the hearing of this cause, and which this Court can review, as follows:

"In not concluding and holding as a matter of law that the forfeiture of the contract of purchase of D. B. Phillips of the land in controversy, made by the Commissioner of the General Land Office in August, 1897, was void, in that the Statute under which he acted contravenes Section 10, Article 1, Constitution of the United States, which inhibits any State from passing any law impairing the obligation of a contract, because this land was purchased by Phillips from the State of Texas, under a law made by the State in 1885, which especially prohibited forfeitures of such sales for non-payment of interest and all legislation subsequent thereto, such as the acts of 1895 and 1897 authorizing such forfeitures for non-payment of interest, would and did impair the obligation of his contract, made under this act of 1885. And hence the act of the Legislature of Texas under which the Commissioner acted in this particular was unconstitutional and void." (Rec. 27.)

There was judgment in the District Court of Wilbarger County against the Plaintiff in Error. (Rec. 3.)

It was insisted in that Court, that the Statute authorizing the Commissioner, to make this summary forfeiture, was unconstitutional and void, because it impaired the obligation of Phillips' contract with the State, and was inhibited by the Constitution of the United States. (Rec. 4.)

On Appeal, to the Court of Civil Appeals, for the Second Supreme Judicial District of Texas, this

was one of the grounds. assigned as Error, committed by the District Court of Wilbarger County. (Rec. 8.)

But the judgment of the Court of Civil Appeals was adverse to the Plaintiff in Error, on this as well as other contentions. (Rec. 14 and 15.)

It will be observed from the Record that several phases of this case, were certified by the Court of Appeals to the Supreme Court of this State for answers, but are not material here, further than to show, that the Supreme Court held that this forfeiture could have been had, under the act of 1897, and that this act did not have the effect of repealing Sec. 11, of the law of 1895, which authorized identically the same proceeding. (Rec. 11, 12.)

However, notwithstanding this expression of opinion, from our Supreme Court, the Plaintiff in Error, after making a motion for re-hearing in the Court of Appeals, (and again insisting on the invalidity of the Statute, authorizing the forfeiture, but the motion being deaied;) (Rec. 15, 16,) proceeded to make his application to the Supreme Court for writ of Error, to the Court of Civil Appeals, to review its judgment, on various grounds, but especially, was it challenged, for being "*constrained*" by the opinion of the Supreme Court in the case of Fristoe vs. Blum 45 S. W. R. "to overrule the main contention" of Plaintiff in Error in this case (Rec. 14) as to the validity of this Statute, authorizing this summary forfeiture in this particular cause. (Rec. 17, 22.) But this writ was promptly refused. (Rec. 23.) Thus making this judgment of the Court of Civil Appeals, in this behalf the last resort and final.

Hence we come to consider the foregoing assignment of Error, as set out herein.

There is no controversy here, as to the provisions of law when this contract of Phillips was entered into. The Record shows it was made under the law of 1883, as *modified* by the act of February 23rd, 1885. (Rec. 5.)

The essential element of the contract under these several Statutes, is the payment of the interest, on the contract price of these lands, but the last named act vouchsafed to all purchasers under it, that any failure on their parts to pay the annual installments of principal or interest thereon prior to the first day of August after the same becomes due (to which act it had been extended by the act of February 16th, 1885) *should not cause a forfeiture of the rights* of such holder in such land.

There can be no question that a valuable right was hereby conceded to purchasers under this law.

They were promised this and it was made one of the terms of this contract, that they would not be deprived of this valuable right hereby conceded, in event of failure to pay interest at the times stipulated in the contract.

This was the law in existence when this contract was made, not only that, but it was the very law that fixed the terms of this particular contract and made it.

It is not by mere fiction then that it became part of this contract, but entered into it and was as matter of fact part of it.

This act and the one it modified constituted the law, which in its nature formed and became the con-

tract, and when rights have vested under such contract, subsequent legislation cannot divest them. (Fletcher vs. Peck, 6 Cranch, 87.) These laws were in effect a proposition on the part of the State, and having been accepted in this case by Phillips became a binding contract, and one of the terms thereof was, his *right* to hold this land, *should not be forfeited* if he failed to pay the interest at the time specified therein. But the act of 1897 changed the terms of this contract, in that it sought to give the Commissioner of the General Land Office, authority to *forfeit his right* in this land, in the event the interest was not paid, at the time named in this act. Here then was a change sought to be made in the express terms of this contract, it made new conditions, not contemplated when this contract was entered into, it fixed other terms than those agreed on, and the extent of change is immaterial; any deviation from the terms of the contract impairs its obligation, and is obnoxious to the Constitution. (Green vs. Biddle, 8 Wheat 1.) Nor is this rule in any sense changed by this act of 1897, extending the period of the payment of this interest, until the first day of November (Acts 1897, p. 39) and beyond the period allowed in the first instance, and make it applicable to a contract executed before its passage. (Bronson v. Kinzie, 1 How. 311; Howard v. Bugbee, 24 How. 461.)

Nor is it any answer to this proposition to insist that this act of 1897 was a law pertaining to the remedy, for this Court has said in no equivocal terms: "If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the

obligation of the contract in favor of one party, to the injury of the other; hence any law which in its operations amounts to a denial, or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." (McCracken v. Hayward, 2 Howard 608.)

II.

We will examine now the decisions of our State Courts on some of the various statutes on this subject:

The Supreme Court on Writ of Error to the Court of Civil Appeals, Third District, in construing a purchase under the act of 1883, and the acts of February 16th and February 23rd, 1885, held: "The three acts referred to contain all of the Legislation that is applicable to the subject now in controversy."

It will be seen at the date of the passage of the last act there was no law in force providing for the forfeiture of a purchase, except the provisions in the amendatory act of the 16th February, 1885, which declared the failure to pay the interest by the 1st day of August the sole ground for declaring such forfeiture.

The next act plainly declares that such failure to pay interest shall not cause a forfeiture.

It seems to us that the Legislative intention to repeal the only law authorizing the declaration of a forfeiture for the non-payment of interest is manifest from the language used in the act.

If one look to its caption it still more conclus-

ively appears that the purpose was to "prevent" the forfeiture of the rights of purchasers, not to change or limit the facts from which such authority could result.

"If the annual installments of interest shall not be paid as they mature, the State may, and its proper officers should, bring suit for their collection and enforce the State's vendor's lien. Under such a proceeding the interest can be collected as it matures, and the purchasers' rights may be divested as effectually, if not as summarily, as they could have been by a non-judicial forfeiture." Berrendo Stock Co. v. McCarty, 85 Texas, 412.

This act was again drawn in question by Court of Civil Appeals, Second District, on the proposition: that it violated Art. 7, Sec. 4, of the State Constitution, which forbids the Legislature to "grant any relief to purchasers of School land, and it was held: It does not release the purchaser from any part of his obligation, but "simply waived a harsh and summary remedy", and that the Commissioner of the Land Office, at the time he attempted to forfeit the purchaser's rights to the land in question, there was no law in existence authorizing him to do so. Capps et al., v. Garvey, 41 S. W. R., 379.

And further, it was held: by the Court of Civil Appeals, Fourth District, "A provision in a contract to purchase School lands from the State, that the contract shall be forfeited on failure of purchaser to pay interest on the purchase money, is not enforceable, unless such provision is authorized by law." Patterson v. O'Docherty, 23 S. W. R. 293.

But the Supreme Court has lately reviewed at much length, a forfeiture made under the act of 1887, in a case, where the purchase was made under the act of 1883. This case was before it on error, to the Court of Appeals, Third District. This act of 1887, again revived the "forfeiture" provision, such as was contained in the Act of 1883. And it held: "That Section 11 of this act, authorizing the Commissioner of the General Land Office to declare school lands purchased from the State forfeited, when the interest remains unpaid on August 1st of any year, empowers the Commissioner to rescind sales, where the purchaser fails to comply with the terms of the purchase whether the sale was made before or after the enactment of the law, and that this merely provides a new remedy and is not unconstitutional." In discussing the case, it further said, as to the contention that this was unconstitutional. "A sufficient answer so far as this case is concerned, to that proposition, would be that this contract was entered into when such a law existed, and provided for doing the very thing that the Commissioner has done, and the repeal of the law could not constitute on the part of the State an obligation, that it should not be restored in the future; we prefer, however, to put this decision upon the broader ground and stronger position that, when a right exists, the Legislature may give a new remedy, provided it does not deprive either party of a substantial right."

It furthered declared, that the term "forfeiture" was inaptly used in the statute, that it was nothing more than a recission of the contract, and the asser-

tion of the paramount Title on the failure to comply with the contract; that neither this right, nor remedy by recission was given by the Statute of 1887, both existed at common law."

It further took occasion, to say, it would not approve the decision in the case of Berrendo Stock Co. vs. McCarty, Supra, in so far as it pertained to the annunciation, that there was no law in existence between the 1st of August 1887 and the 15th day of November in the same year by which purchases could be declared forfeited, that the only question before the Court, presented by the Record and discussed by the Court, was the former act of Feby. 23rd, 1885, &c. Fristoe vs. Blum 45 S. W. R. 998. Also in 92 Texas 76.

So it can be readily perceived, why the Court of Appeals, having jurisdiction of this case, held: They were "constrained by the opinion of our Supreme Court in Fristoe vs. Blum (Supra) to overrule the main contention of Appellant in this case" (Rec. 14.)

Nor is this all, for very lately, Judge Fly of the Fourth District of Appeals, on an Appeal to that Court, involving a purchase of School land, under the act of 1879, which provided suit should be brought, in event of failure to pay interest &c., whilst yielding, earnestly protests against some of the theories of the Supreme Court, in these cases, and says: "The change made in the law of 1879, by the act of 1897, is not one merely of a change of procedure in the Courts, but it is a wresting from the purchaser of land, the right to be heard in the

Courts at all. This right if not guaranteed to him by the Constitution was given to him by the law which formed a part of his contract. To summarise, we do not think the State or any individual has any Authority in law to declare a contract for the sale of land forfeited, or rescinded regardless of the equities possessed by the Vendee, and if it ever had such Authority, it contracted it away in the law under which the land in this case was bought. Sims vs. Wright 56 S. W. R. 110.

These decisions are cited purely to show the contrarity of opinion in our own Courts, on this subject, and if the majority ruled, or if the Courts of Appeal were not bound by the decisions in our Supreme Court, our contention in this cause would have prevailed in the Court of Appeals for the Second District.

But on this question it is beyond doubt, that the Courts of the United States will not accept as binding, the opinions of the State Courts. Citizens Saving Bank v. Owensboro, 173 W. S. 636. Douglas v. Kentucky, 168 W. S. 488.

III.

This same provision of forfeiture in the act of 1887 was contained in the act of 1897, and under which the forfeiture in the case at bar, was had. This word "forfeiture" is used in all of the acts of the Legislature on this subject down to 1897, and on the "obligation of the purchaser" the Commissioner is directed, when interest is not paid as required, to endorse "land forfeited"; and this is to be the evidence of the fact, and do dispense with

judicial ascertainment thereof. So far as the legal effect of this act of the officer is concerned, it may amount to recission: in either sense it would deprive purchaser of his right in the land.

This having then been stated clearly in all of this legislation, there can be no doubt, in the most unequivocal manner, it was distinctly asserted in the act of February 23rd, 1885, that thereafter he should not be "*deprived* of that right." It is inconceivable, that this act can be read and understood in any other sense, than an *obligation* on the part of the State, to *guarantee a right* to these purchasers, and of which they shall not be deprived. And this was a modification of the act of 1883, which strictly comprised all the terms of the contract, and if as a matter of fact it did not, being the law in existence at the time the contract was made, it entered into it and became part of it. But the Court in the case of Fristoe v. Blum seeks to escape this dilemma by putting it on the common law right to rescind, which it claims existed independent of the Statute.

But this is the State acting, and that very case concedes the State has no greater right in such case than an individual. But we ask this Court how the State could exercise that right, without some Statute designating the officer or person, to perform this function." From this we see no escape. Under this very decision, both of these rights, which it is claimed existed at common law, could not have been exercised but for this Statute of 1887, and it is too clear for argument to contend that this legislation was intended to carry into effect the theory therein announced, or

that it can be perverted to other purposes than that which is evident.

But even conceding this proposition, in the case of Capps v. Garvey, supra, this summary method of "forfeiture" or recission was held to have been waived by the act of February 23rd, 1885, and this case is still in full force. If the right has been waived, the act cannot be exercised summarily without impairing the right.

But it is a doctrine as old as this State, unless time is of the essence of the contract, no summary recission can be had, and the mere fact that land was the subject matter of this contract, is not sufficient to show time was of the essence of the contract; it must be by express agreement, or implied from the circumstances surrounding the case, or the nature of the property show such was the intention of the parties. Edwards v. Atkinson, 14 Texas 373-4.

And when time is not of the essence of the contract, mere delay in payment will not annul the contract nor authorize its recission. Hild v. Lime, 45 Texas 476.

Not only this, if time were of the essence of the contract, if the vendor has received part of the purchase money and gives indulgence after default, the only way to put an end to the waiver is by demand of payment and notice of intention to rescind. Scarbrough v. Arrant, 25 Texas 130.

All of these cases proceed upon the common law theory of paramount title and rescission, and we beg to refer to them to show that the Court in the case

referred to has not followed or applied in full force the very doctrine it espouses.

But it seems to us that our Supreme Court in considering this question, has separated the law pertaining to the remedy, and distinguished it from the "obligation of the contract," as though the remedy in existence when the contract is made, is not a part of it.

But it is well settled in this court, that the means of enforcing the contract, in existence when it is made, are so far a part of it, that it cannot be changed to the detriment of the rights of either party to the contract. (Barnitz vs. Beverly, 163 U. S., 122.

The legislature in our case did prescribe a new remedy, in the acts of 1897, p. 184, and the commission acted under it on the 20th August, 1897, and "forfeited" our rights to the land in controversy. (Rec. 5.)

This was a different remedy from the one in existence in 1885, when our contract was made, and materially impaired the rights *guaranteed* to us thereunder, and it is of this act about which we complain, and contend it is void as impairing the obligation of the contract entered into.

But this brief is already longer than anticipated and will close it.

We confidently submit this cause, remaining firm in the faith, that this act of 1897, which authorized the commission to declare the contract in the case "forfeited" is unconstitutional and void,

and will so be pronounced by this Court, and to that end we ask that this cause be reversed, and all of which is—

Respectfully submitted,

W. W. FLOOD,

Attorney for W. T. Waggoner.

No. 28.

Brief of Flood for T. C.

Office Supreme Court U.S.
FILED
SEP 26 1902
JAMES H. MCKENNEY,
Clerk.

Filed Sept. 26, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error.
} No. 28.

In Error to the Court of Civil Appeals, for the Second Supreme Judicial District of Texas.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

W. T. WAGGONER, Plaintiff in Error,
vs.
J. M. FLACK, Defendant in Error.

No. 28.

In Error to the Court of Civil Appeals, for the Second Supreme Judicial District of Texas.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

At the October Term, 1902, of this Court, the Plaintiff in Error filed his brief in this cause, and for reasons unknown to him, no appearance has been made by the defendant in error: but as the Court has directed that notice of the pendency of this cause be given the Attorney General of Texas, with leave to

file briefs herein for the defendant in error, and in pursuance thereof the Attorney General has filed briefs herein, in which it is contended that the decisions of this Court at its last Term in the case of Wilson vs. Standefer, in error to the Court of Civil Appeals, for the Third Supreme Judicial District of Texas, is virtually decisive of this cause, and thereby giving to it a trend not originally anticipated—it is deemed best to restate the contention of the plaintiff in error by way of printed argument, as well as to reply to the contention of the Attorney General, and therewith submit authorities deemed to support the propositions contended for, and supposed to have been unnecessary in the first instance. When the case was originally briefed, it was thought a cursory review of the most of the acts of the Legislature of Texas, relating to the sale of her school lands might be of assistance to the Court, in the investigation of the subject of this controversy; but we are inclined now to believe it tended rather to confuse on account of the many changes made, rather than throw additional light on the subject, or aid in its interpretation.

So we shall now confine ourselves solely to the act under which the purchase was made, and that under which the forfeiture was had.

The record shows that this purchase was made under the act of 1883, as modified by the act of February 23rd, 1885.

It is also shown all interest was paid up to January 1st, 1893, and tender made of all back interest. (Record 5.)

The acts of the Legislature of 1883, and of those of 1885, modifying the foregoing are shown at length on pages 4 and 5 of the brief of plaintiff in error, and will not be set out again.

It will be observed that while Section 9 of the Act of 1883, provided for the payment of one-thirtieth of the principal on the first of each succeeding year, yet there was a provision in the same section that failure to pay the annual installments of principal shall not work a forfeiture until the whole sum is due. So we will not allude further to that phase of the statute, and confine ourselves solely to the question of interest, as out of the failure to pay this interest, amounting to $61.87 annually for the four years from '93 to '97, springs the whole controversy. For whilst this was originally due on the 1st of March, it was by the tenth section of the Act of February 16th, 1885, postponed to 1st day of August. (Brief, pp. 4 and 5.)

But Section 10 of this act had the stereotyped provision to be found in all of the acts on this subject since 1887, providing if the interest remains unpaid after the first day of March of any year, the obligation of the purchaser shall be indorsed, "Lands forfeited," and it shall ipso facto work a forfeiture and there shall be no necessity for judicial ascertainment of the facts of the forfeiture.

Thus the law stood until the 23rd of February, 1885, when the Legislature passed a bill entitled: "An Act to prevent the forfeiture of the rights of the purchasers of Public Free School, University or Asylum Land."

Section 1.—"Be it enacted by the Legislature of the State of Texas, that the failure of a holder of Public Free School, University or Asylum Land under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land." (See the act at length on pages 5 and 6 of brief.)

Now D. B. Phillips had bid on this land $2.00 per acre and same had been awarded him in November, 1885, at that price on thirty years' time, and he paid one-thirtieth of the principal in cash, (Record 5) and a free translation of the remainder of the contract between himself and the State, was the payment of five per cent. interest on the remaining unpaid purchase price, amounting to $61.87 annually, on or before the 1st of August each year, with the distinct understanding, in the event he should fail to make this interest payment, it should not work a forfeiture of his rights in this land.

It is true this annual interest was paid until January 1st, 1893, but none thereafter, though an offer to do so was made. (Record 5.) The status of this matter was in no manner attempted to be changed until August 20th, 1897, when the record shows the land was forfeited for non-payment of interest by the Commissioner of the General Land Office of the State of Texas, without any judicial procedure or suit in Court, on the day aforesaid, and thereafter was again placed on the market and sold to J. M. Flack, the defendant in error, for $1.00 per acre. (Record 5.)

This action on the part of the Land Commissioner was induced by an act of the Legislature passed in March, 1897, taking effect ninety days thereafter, entitled: "An Act to authorize the Commissioner of the General Land Office to forfeit all lands heretofore sold by the STATE under any of the various acts of the Legislature, for failure to pay any portion of the interest thereon", and set out on pages 7 and 8 of brief of the plaintiff in error, filed herein.

This then presents sharply the contention of the plaintiff in error, that this Act of March, 1897, impaired the obligation of the contract entered into between D. B. Phillips, the vendor of plaintiff in error, and the State of Texas, as expressed in the Act of 1883, as modified by the Act of February 23d, 1885.

While a State engaged in governmental functions is to be regarded as a sovereign, yet when it becomes a party to a contract with a citizen the same law applies to it, as under like conditions would apply to an individual.

This rule is fully recognized by the Supreme Court of Texas in the construction of a statute on the same subject as the one now under discussion, and was so announced in the case of Fristoe vs. Blum, (92 Texas, 77) and in support thereof cited Davis vs. Gray, (16 Wall., 203) and Railway vs. United States, (14 Otto., 680) decided by this Court, and the former originating in this State.

Again the Court of Civil Appeals for the Second Supreme Judicial District in construing the Act of 1887, relating to the sale of the school lands, and which in all essentials is similar to the act under dis-

cussion, varying only in detail; but the manner of carrying the act into effect is vested in the Commissioner of the General Land Office, rather than in a board designated for that purpose, as was done in the Act of 1883,—distinctly held, this was a proposition on the part of the State to the class of persons specified in the statute, and the SALE is between the law and the proposed purchaser, and, in effect, the Commissioner has no discretion in the matter, but is bound to accept the application to purchase made in compliance with the law. (Metzler vs. Johnson, 20 S. W. R., 1116.) This case is followed in Hitson vs. Glasscock, (21 S. W. R., 710) and in other subsequent cases, and is the accepted doctrine in this State, and thus clearly making it a contract between the purchaser and the State, and the law itself constituting the contract between the State and the purchaser.

The Supreme Court of the State in construing the act of 1879, in reference to the same subject matter, held that Sections 6, 7, 8, 9 and 10 of that act embraced all the terms of the contract between the State and the purchaser, (Standefer vs. Wilson, 93 Texas, 232) and this is the very case affirmed by this Court at its last Term on writ of error from the Third Judicial District of Texas.

The only controversy in that case grew out of the twelfth section of that act, which provided, in case of default in payment of interest on the contract, the proper officer shall institute proceedings to forfeit the purchase, and judgment of forfeiture shall be entered. But this section of this act was held not to be a part of the contract, though it was conceded if

it had been a term of the contract it should be treated as prescribing the exclusive method of forfeiture. The same Court had already held, persons may contract for a remedy lawful in itself, but not given by law, for the enforcement of a right. (Loan Association vs. Hardy, 86 Texas, 610.) That case grew out of a contract lien with power of sale, wherein it was provided a particular mode should be followed in case of sale. Subsequently the Legislature provided a different method and it was declared to be repugnant to the Constitution, as impairing the obligation of the contract, and in support of that decision the Court cited the case of Bellmeyer vs. Evans, (40 Pa. St., 327) in the following language:

"But a statute strictly remedial may impair the obligation of a contract; and when this happens the act is unconstitutional. (Bronson vs. Kinzie, 1st How., 322.) This always happens when the parties make legal remedies a subject of their contract, and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves, and the legislature must let them alone * * * If the thing provided for by the legislature be within their general competence, and yet, be the very thing expressly excluded by a particular contract it is plain as to the parties to that contract, the law is unconstitutional and void, because it impairs the obligation of their contract."

So these decisions from the Supreme Court of Texas, on this question of forfeiture, provided for in the

acts discussed, as a method of rescission of the contract of sale of its Public School Lands in effect held, in the one case that this provision was not a part of the CONTRACT, and for that reason, no complaint could be urged against it, and besides the statute did not give the right, it already existed and might be subsequently authorized by the law-making power, and in the other case, that the same provision occurred in the act, creating the contract, and the subsequent enactment of the same provision could not constitute an obligation on the part of the State, that it should not be restored in future, but it was distinctly announced, and the opinion was put on the "broader ground and stronger position that when a right exists the legislature may give a new remedy, provided it does not deprive either party of a substantial right."

We beg now to restate the case at bar, and the acts under which it was made, for these constituted the contract, and the contrast between it and the acts which elicited the opinions just alluded to, occurs to us, will make it plain that these decisions in no manner affect our case adversely, but that one of them and the latest adjudication on the subject virtually holds, the contention we make in this case is correct, and the act of 1897, when applied to it would be unconstitutional, as impairing the obligation of the contract.

The record shows that Phillips, the purchaser of the section in controversy, was awarded the same in November, 1885, on his application, at $2.00 per acre, thirty years time, one-thirtieth cash and five per cent.

interest on the remainder, payable on the first of each succeeding March, which was subsequently extended to the first day of August, and the record also shows it was subsequently forfeited for non-payment of interest on the 20th of August, 1897, without any judicial procedure or suit in Court. (Record 5.)

The statute required (Section 9, Acts of 1883,) the purchaser shall pay one-thirtieth of the principal, and five per cent. interest on the remainder, on the first day of each succeeding March. (All other part of payment on principal being postponed until the whole sum is due.) But this act also provided for summary forfeiture, in case of failure to pay interest on first day of March of any year, when the same remains unpaid. (Sections 9 and 10, Acts 1883, set out in brief.)

So the law stood until February 16th, 1885, when Sections 9 and 10 of the acts of 1883 were amended, but in no essential particular, so far as the question in hand is concerned, but a few days thereafter, on viz: February 23rd, 1885, the following act was passed: "An Act to prevent the forfeiture of the rights of purchasers of Public Free School, University or Asylum Land."

Section 1. Be it enacted by the Legislature of the State of Texas: That the failure of a holder of Public Free School, University or Asylum Land under contract of purchase from the State, to make annual payments of principal or interest thereon prior to the first day of August after the same becomes due SHALL NOT CAUSE a forfeiture of the rights of such holder in such land."

This is all the law, and all the contract. There has been no question made, nor can there be, that the foregoing act was not a part of the contract between the State and Phillips. On the agreed statement, on which this cause was tried, it was distinctly stated: "We, the attorneys for the plaintiff and defendant, agree that the facts in this case are:

That D. B. Phillips, under the act of 1883, as modified by the act of February 23rd, 1885, on 30th of October, 1885, made application in compliance with the ruling of the State Land Board of Texas to purchase the land in controversy, etc."

These acts, as has already been shown, under our own decisions, comprise all the terms of the contract, between the purchaser and the State, and being so, it seems to us, there can be no escape from the conclusion, that this act of the 23rd of February, 1885, is as much a stipulation in the contract, as is the obligation to pay five per cent interest on all of the unpaid purchase price.

This being true, it would seem superfluous to add that the Act of 1897, which authorized summary forfeiture on all lands theretofore sold by the State, for any unpaid interest, and the action of the Commissioner of the General Land Office, in proceeding under that Statute to forfeit the land in controversy, not only impaired the obligation of the contract between Phillips and the State, but deprived him of a valuable right, conceded under the law constituting his contract.

Then the deductions in Fristoe vs. Blum, 92 Texas, 77, in no manner conflict with the contentions

in this case, for there the Court was construing a contract made under the Act of 1883, before its modification on the 23rd of February, 1885, and simply held, no complaint could be made on ground of a summary forfeiture made under a subsequent law, as the contract in hand was made under a law, providing for the same method.

Nor does the conclusion reached by the Court, in Standifer vs. Wilson, 93 Texas, 232, conflict in any wise with what is claimed, in the cause at bar, because, in that case, it was held that Section 12 in the Act of 1879, providing in case of default in payment of interest, the proper officer should proceed to institute suit, to declare the forfeiture, was not a part of the contract, and hence no rights of complainant were abridged by subsequent act authorizing summary forfeiture.

But we beg to invite the Court's especial attention to a portion of the opinion in the case supra., as follows:

"The Statute of 1879 does not give authority to any officer to rescind without judicial action, but the right of recission existed in the State, and its exercise might be subsequently authorized through the law-making power; and an exercise of it, based upon the default of the other party, would not be a denial of any right of his.

IT COULD ONLY BE HELD THAT THE RIGHT OF RESCISSION, FOR DEFAULT OF THE PURCHASER, DID NOT EXIST, BY HOLDING THAT THE CONTRACT HAD PROVIDED THAT IT SHOULD NOT EXIST, or that it should be exercised in a particular manner, but the contract embraces no such

provision." Standifer vs. Wilson, 93 Texas, on page 238.

The contract in the case before the Court unequivocally provided, "that failure to pay interest shall not cause a forfeiture of the rights of such holder in such land," and comes fully in the terms of such a contract as Judge Williams, in the case supra., says would NOT authorize a rescission of the contract, for rescission is nothing more nor less than that which is denominated "forfeiture" in all of the statutes on this subject. This being conceded by the Supreme Court of Texas, it would seem useless to elaborate the subject further, and to do so could serve no good purpose.

Not only that, but this case, in the above particular, pointedly refutes the contention of the Attorney General of Texas, in the brief filed in this cause by him, that the decision in that cause, which was affirmed by this Court, concludes the case at bar, for we think it not only does not do that, but is a bow of promise, in the judicial firmament, to those standing in the stead of the purchaser of the land in controversy, that their rights in this respect are inviolable.

Again, we beg leave to differ with the Attorney General in his conclusion, because it was held, Section 12 of the Act of 1879, in construing a purchase of land under that Act, was not a part of the contract, and that Section 10 of the Act of 1883 (the forfeiture provision), being eliminated by the Act of 1885, that therefore the last Act is not a part of the contract of a purchase under its provision. This seems to us not merely illogical, but it begs the question. Because

the Court held, Section 12 contained none of the provisions of the contract, nor expressed any of the rights or obligations arising thereunder, but was simply a general law of the State, for enforcing rights in the Courts, it does not follow that the Act of 1885 is similar to the foregoing, and subject to the same construction, and, as a matter of fact, could not possibly be subject to the same construction, since it in no manner undertook to prescribe a method for enforcing rights in the Courts, but distinctly provided for the very converse of such a course, in that it positively waived and relinquished to the purchasers under this law, the authority it had under the common law, to forfeit the rights the holders of these lands had acquired in their contracts of purchase, either through or without the intervention of the Courts. This decision went one step further: It held the parties might contract for a special remedy, and when they did, it must be respected. That being true, the converse of the rule must hold good, and the State can obligate itself, as it undertook to do and did do, not to resort to this summary measure, but to relinquish it in the interest of its purchasers, as was done by the Act of 1885. A sufficient reason for this course is shown in the emergency clause of this bill, declaring its importance to many citizens of the State, made it imperative to suspend the constitutional rule and make it effective after its passage. (Sec. 2.) And in this, the State could suffer no injury. The vendor's lien remained intact, and her suit to foreclose this lien remained open all the time, and it will be noticed the Act of 1897, providing for this forfeiture,

declared the Act to be cumulative and not intended to deny to the State any legal proceeding that may be deemed necessary to secure the purchase money or the possession of the land sold.

We fail to see any method of escape from the conclusion, that the provisions of this Act of 1885 were as much a part of the obligation on the part of the State, in the sale of this land, as was the provision to convey the title, when the purchaser has complied with the terms of payment, as shown in the contract. And we respectfully submit this cause should be reversed.

W. W. FLOOD,
Attorney for W. T. Waggoner.

No. 149. 28
Brf. of Def. for State of Texas
Filed Mar. 24, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 149.

W. T. WAGGONER, PLAINTIFF IN ERROR,

vs.

J. M. FLACK, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF C. K. BELL, ATTORNEY GENERAL OF THE STATE OF TEXAS.

C. K. BELL,
Attorney General,
T. S. REESE,
Assistant Attorney General,
Counsel for the State of Texas.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 149.

W. T. WAGGONER, Plaintiff in Error,

vs.

J. M. FLACK, Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Brief of C. K. Bell, Attorney General of the State of Texas.

In this cause the defendant in error, J. M. Flack, does not appear in this court by brief of counsel or otherwise.

On February 4, 1902, the following order was made herein:

"Notice of the pendency of this cause directed to be given to the Attorney General of Texas, and leave is given to file briefs for defendant in error within twenty days. Counsel for plaintiff in error is required to file printed copies of statutes referred to."

And afterwards this court was kind enough to extend the time for filing brief by the Attorney General of Texas to thirty days.

The question involved in this case is one of very great public importance in the State of Texas, inasmuch as a decision of this question in favor of plaintiff in error would necessarily result in the setting aside of all forfeitures of public lands falling under the same conditions as presented herein and the cancellation of all sales made of such lands after declaration of forfeiture by the Commissioner of the General Land Office.

For this reason, the State of Texas avails herself of the opportunity so kindly presented by this court in the order herein quoted

and submits, briefly, in support of the judgment rendered in this cause in the State courts the following:

It is submitted *in limine* that the sole question to be decided has been decided by this court at the present term in the case of T. K. Wilson vs. J. F. Standifer, No. 105, opinion rendered March 3, 1902. In the opinion in that cause this court quotes with approval from the opinion of the Supreme Court of Texas, and concludes as follows:

"Upon the whole, we agree with the conclusion of the Supreme Court of Texas, that no contract rights of a purchaser under the Act of 1879 were impaired by the provisions of the subsequent Act of 1897; that the twelfth section of the Act of 1879 was not, in legal contemplation, a stipulation by the State that the only remedy which might be resorted to by the State was the one therein provided for; that, in the language of Chief Justice Marshall, 'the distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct.'"

I shall endeavor here simply to show that the case at bar falls clearly within the principle here decided.

As in the case of Wilson vs. Standifer, the forfeiture here complained of as being violative of the Constitution of the United States, was had by the Commissioner of the General Land Office under the provisions of the Act of 1897, which provided for "office forfeitures," as distinguished from "judicial forfeitures" of lands sold, in case of failure to pay interest.

This act is, as shown in the brief for W. T. Waggoner, plaintiff in error, on page 7, "That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas, for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, University, or any of the other various State institutions, has not been paid, it shall be the duty of the Commissioner of the General Land Office to endorse on the obligation for said lands 'Lands Forfeited,' and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and

shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law; provided, the purchaser of said land shall have the right at any time within six months after such endorsement of 'Land Forfeited' to institute a suit in the district court of Travis county, Texas, against the Commissioner of the General Land Office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but if no suit has been instituted as above provided, such forfeiture of the Commissioner of the General Land Office shall then become fixed and conclusive; provided, that if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death," and is referred to in the opinion of this court in Wilson vs. Standifer, page 4 (paragraph 12 of statement of facts quoted in the opinion).

In each case there was a forfeiture of the land by the Commissioner of the General Land Office without judicial ascertainment and afterwards a sale to the defendants in error, respectively.

In the case of Wilson vs. Standifer the sale afterwards canceled for failure to pay interest was made under the Act of July 8, 1879.

This statute does not give to any officer of the State the right to declare a forfeiture of sales made thereunder for failure to pay interest, but, on the contrary, the act, in Section 12, expressly provided for a suit in the district court by the county or district attorney on the part of the State, in case of such failure. It was contended by plaintiff in error in Wilson vs. Standifer that this provision as to judicial forfeiture was part of the contract of sale under that act, which could not be abrogated by a subsequent act providing for a declaration of forfeiture by the Commissioner of the General Land Office without judicial action. This contention was overruled by this court.

In the case at bar the sale was made under the Act of 1883, Section 10 of which expressly provided for a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment, for non-payment of interest, by March 1, 1883.

By an amendment of this section in 1885, August 1st was fixed as the date of payment instead of March 1st, as in the original act. Previous to the sale of the section of land involved in this suit, however, the Act of February 23, 1885, was passed. This act is set

out in brief of plaintiff in error (pp. 5 and 6). The first section of this act is as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the failnre of a holder of public free school, University or asylum land under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land."

So the question is, is this provision a part of the obligation of the contract between the State and a purchaser of public land, entered into while this act was in force, to such an extent as to preclude the Legislature from afterwards providing for a forfeiture or rescission of such sales by the State through the proper officer without judicial ascertainment?

While this question was not directly passed upon by the Supreme Court of Texas in Fristo vs. Blum, 92 Texas, 76, as the sale in that case was made under the Act of 1883, prior to the passage of the Act of 1885 above recited, the opinion in that case is broad enough, and certainly was expressly intended to be broad enough, to embrace sales made under that act after the passage of the Act of 1885.

The following expression from the opinion of the Supreme Court of Texas in Fristo vs. Blum, *supra*, is here quoted (pp. 83-84):

"But it is said that a construction of section 11, which would give to the Commissioner of the General Land Office the authority to enter a forfeiture as in this case would render the act unconstitutional, because it would be giving to it a retroactive effect by which it would violate the obligation of the contract. A sufficient answer, so far as this case is concerned, to that proposition would be that this contract was entered into when such a law existed and provided for the doing of the very thing that the Commissioner has done, and the repeal of that law could not constitute on the part of the State an obligation that it should not be restored in the future. We prefer, however, to put this decision upon the broad ground and stronger position that where a right exists the Legislature may give a new remedy, provided it does not deprive either party of a substantial right. Sutherland vs. De Leon, 1 Texas, 305; Johnson vs. Taylor, 60 Texas, 362."

This will suffice to show the difference and the only difference between the case of Wilson vs. Standifer and the case at bar.

The Act of 1883 provided for forfeiture by the Commissioner of the General Land Office without the action of the courts. The Act of 1885 provided that the failure to make annual payment of principal and interest prior to August 1st after the same becomes due shall not cause a forfeiture of the rights of such purchaser.

Under the Act of 1883 the only remedy provided by which the State could rescind the contract and recover the land was the remedy of a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment. There is no express reservation of the cumulative remedy of judicial proceedings for that purpose, as in the Act of 1897, so that the most that can be said for the contention of plaintiff in error is, that after the passage of the Act of 1885, no remedy was provided *by statute* for rescission or forfeiture by the State in case of failure to pay interest on lands sold while the Act of 1885 was in force. In other words, the Act of 1885 repealed section 10 of the Act of 1883. This did not bind the State, as an obligation of its contract of sale, not to provide a remedy by future legislation with regard to such sales. (Fristo vs. Blum, 92 Texas, 84; Sturgis vs. Crowinshield, 4 Wheaton, 122.)

The only difference, then, between the case at bar and Wilson vs. Standifer is, that in the former the sale was made under a statute which did not provide any remedy for failure to pay interest, while in the latter the sale was made under a statute which did provide a particular remedy, *i. e.*, by judicial proceeding for a rescission of the contract and the recovery of the land.

If, as declared in Wilson vs. Standifer, the Legislature might, without violating the obligation of the contract of sale, drastically change the remedy expressly provided in the statute under which the sale is made, it is respectfully submitted that there can be no sound reason for holding that it could not, by subsequent legislation, provide a remedy where none is given in the statute under which the sale is made.

If the remedy expressly given by section 12 of the Act of 1879 was not a part of the contract, as held in the above case, then surely the elimination by the Act of 1885 of the statutory remedy given by section 10 of the Act of 1883, can not be said to be a part of the contract of sale under that act.

The repeal by the Act of 1885 of the provisions of section 10 of the Act of 1883, left unimpaired the common-law right of rescission

(Fristo vs. Blum, *supra*), taking away only the statutory remedy of forfeiture. The case is as if no remedy at all had been provided in that act. There was left the obligation of the purchaser to pay according to the terms of his contract, and the common-law remedy of the State for a rescission of the contract of sale for failure on his part to do so. After the sale in this case, the Legslature changed the common-law remedy, or rather adds to it the specific remedy of rescission by the act of the Commissioner of the General Land Office.

It is submitted that the case is clearly within the doctrine announced in Wilson vs. Standifer by this court and in Fristo vs. Blum, by the Supreme Court of Texas.

It is not too much to say that hundreds of titles of settlers on public lands in Texas will be overthrown if the contention of the plaintiff in error is sustained by this court. These titles rest upon a construction of the statute law of the State by the Supreme Court. We quote from the opinion of this court in Wilson vs. Standifer:

"But as the general rule is that the interpretation put on a State constitution or laws by the supreme court of that State is binding upon this court, and as our right to review and revise decisions of the State courts in cases where the question is an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of the court, even in such a case, to follow the decision of the State court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating the exercise of the taxing power, or relating to the State's disposition of its public lands."

It is respectfully submitted that the judgment of the Court of Civil Appeals of Texas should be affirmed.

C. K. Bell,
Attorney General,
T. S. Reese,
Assistant Attorney General,
Counsel for the State of Texas.

No. 28.

Brf. of Bell for Def.

Office Supreme Court U. S.
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Clerk.

Filed Oct. 4, 1902.

In Supreme Court of the United States,

OCTOBER TERM, 1902.

W. T. WAGGONER, PLAINTIFF IN ERROR,

No. 28. vs.

J. M. FLACK, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS, FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

ARGUMENT OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS ON BEHALF OF THE DEFENDANT IN ERROR.

C. K. BELL,
Attorney General of the State of Texas,
on the part of J. M. Flack, Defendant
in Error.

VON BOECKMANN, SCHUTZE & CO., PRINTERS, AUSTIN, TEXAS.

In Supreme Court of the United States,

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IN ERROR TO THE COURT OF CIVIL APPEALS, FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

ARGUMENT OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS ON BEHALF OF THE DEFENDANT IN ERROR.

Upon a careful consideration of the brief and argument of plaintiff in error in this cause, and of the terms of the statute upon the provisions of which the argument turns, it is suggested that there has possibly been in the presentation of this case, both in the State court and in this court, a misconception of the purpose and meaning of the Act of February 19, 1885. The decision of the Supreme Court of Texas in Berrendo Stock Co. vs. McCarty, 85 Tex. Rep., 412, has been accepted without question notwithstanding the criticisms of the opinion in that case in Anderson vs. The Bank, 86 Tex. Rep., 619, and Fristoe vs. Blum, 92 Tex. Rep., 85. I do not think the ruling on this point of the State Supreme Court in Berrendo Stock Co. vs. McCarty should be followed by this court. I think we are justified in saying that it would not now be followed by the Supreme Court of Texas.

I am persuaded that a brief statement of the various

provisions of the statutes on this subject will lead to this conclusion.

The Act of 1879 is entitled, "An Act to provide for the sale of the alternate sections of land in organized counties, as surveyed by railroad companies and other works of internal improvement, and set apart for the benefit of the common school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith."

After various provisions with regard to the sale of the lands referred to in the title, Section 12 of the act is as follows:

Sec. 12. "If, on the first day of March following the maturity of any payment, the interest on money due has not been paid to the State Treasurer, and his receipt filed with the Commissioner of the General Land Office, as provided in section eleven of this act, it shall be the duty of said Commissioner to notify the county or district attorney of the county in which such land is situated of such failure, giving the name of the purchaser so failing to make payment, with the amount and date of his note, and the amount of principal and interest due at the time of such failure; and upon the receipt of such notice it shall be the duty of the county or district attorney to cause a writ to be issued and served on the purchaser, or, in case of his death, upon his heirs or legal representatives, requiring him or them to show cause why he or they should not be ejected from such land; and upon his or their failure to show that the annual installments of interest have been paid, as above provided, a judgment shall be rendered against him or them, and a writ of possession shall be issued in favor of the State. That a copy of such judgment, under the signature and seal of the clerk of the court rendering the judgment, shall be forwarded to the State Treasurer, who shall immediately endorse the obligation of such purchaser "forfeited," note the fact of such endorsement on the copy of judgment aforesaid, and forward the same to the Commissioner of the General Land Office. The said Commissioner shall file said copy of judgment with the claim of such defaulting purchaser, and shall note such forfeiture on the account kept with said purchaser, and shall notify of the county in which said land is situated

that said land is again for sale." Chapter 28, Acts 16th Legislature, Session Acts 1879, p. 23.

The title was amended in 1881, so as to include school lands in unorganized as well as organized counties. Certain other provisions were also amended, but such amendments are immaterial to the present discussion. Chapter 105, Acts 17th Legislature, Session Acts 1881, p. 119.

The next act is the Act of 1883, entitled, "an Act to provide for the classification, sale and lease of the lands heretofore set apart for the benefit of the Common School, University, the Lunatic, Blind, Deaf and Dumb and Orphan Asylum funds.

This act superseded the Act of 1879 as to sales thereafter to be made. Section 10 of the act is as follows:

Sec. 10. "If upon the first day of March of any year the interest due remains unpaid the custodian of the obligation of the purchaser shall endorse on it "lands forfeited," and the account kept with the purchaser shall show such failure to pay and such forfeiture; the failure to pay the interest shall *ipso facto* work a forfeiture and the entry on the account shall be evidence of the fact, and there shall be no necessity for judicial ascertainment of the facts of the forfeiture; and no defaulting purchaser or those claiming under him, shall evade or avoid the effect of such forfeiture at once by reason of any statute or law, which for coverture, infancy or the like would otherwise give them additional time for payments or action, except as follows: Should any purchaser die, the representatives or heirs of the deceased shall have one year within which to pay the interest due on the first of March next after such death." Chap. 88, Sec. 10, Acts Regular Session 18th Leg., Laws 1883.

On February 16th, 1885, the following act was passed (As it is short it is here copied in full):

An Act to amend Sections 9 and 10 of an act entitled "An Act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the Common School, University, the Lunatic, Blind, Deaf and Dumb and Orphan Asylum funds."

"Section 1. *Be it enacted by the Legislature of the State of Texas*: That Sections 9 and 10 of an act entitled "An

Act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the Common School, University, the Lunatic, Blind, Deaf and Dumb ond Orphan Asylum funds" be and the same are hereby amended so as to hereafter to read as follows:

Section 9. The purchaser shall pay at once to the person selling for the State or to the State Treasurer as the Board may determine and within such time as it may fix, one thirtieth of the amount bid and execute his obligation for the remainder of the purchase money payable to the State of Texas and binding the purchaser to pay one thirtieth of the whole price on the first day of each succeeding year until the whole is paid, and interest at the rate of five per cent. per annum on the whole unpaid purchase money from date payable annually on or before the first day of March of each year; and provided, that after the expiration of seven years the purchaser shall have the option to pay the unpaid principal; and provided, that a failure to pay the annual installments of principal shall not work a forfeiture until the whole sum is due; provided, that upon proof of actual occupation, use and improvement for three consecutive years, the purchaser shall be permitted to pay all of the purchase money remaining unpaid; provided, also, that if the payment of the annual installments of interest be made by the first day of August succeeding the first day of March when the same became due then no forfeiture shall result or be taken for such delay in such payment: provided further, that any person acting as agent or attorney for another in the purchase of any of said lands shall file with the person authorized to sell a legally executed power of attorney from his principal or other instrument in writing from a court of competent authority to invest him with powers to consummate a contract.

Section 10. If upon the first day of August of any year the interest due on the first day of the previous March remains unpaid the custodian of the obligation of the purchaser shall endorse on it 'lands forfeited.' and the account kept with the purchaser shall show such failure to pay and such forfeiture; the failure to pay the interest by the first day of August following its maturity shall *ipso facto* work a forfeiture and the

entry on this account shall be evidence of the fact and there shall be no necessity for judicial ascertainment of the facts of the forfeiture; and no defaulting purchaser or those claiming under him shall evade or avoid the effects of such forfeiture at once by reason of any statute or law, which for coverture, infancy or the like would otherwise give them additional time for the payments or action, except as follows: Should any purchaser die the representatives or heirs of the deceased shall have one year within which to pay the interest due on the first day of March next after such death.

Section 2. The fact that this act should take effect before the first day of March, 1885, in order to avoid forfeitures which otherwise might be taken at that time creates an emergency and an imperative public necessity that the rules requiring bills to be read on three several days be suspended and that this act take affect from and after its passage, and it is so enacted." Chapter 12, Acts 19th Leg., Session Acts 1885, p. 13.

On February 23, 1885, the following act was passed, which, being short, is also copied in full:

An Act to prevent the forfeiture of the rights of purchasers of Public Free School, University or Asylum land.

Section 1. *Be it enacted by the Legislature of the State of Texas:* That the failure of a holder of public free school, University or asylum land, under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land.

Section 2. The near approach of the close of the session and the importance of this bill to many citizens of this State, create an imperative public necessity and emergency authorizing the suspension of the constitutional rule requiring bills to be read on three several days, and demanding that this act take effect from and after its passage, and it is so enacted." Chapter 17, Acts 19th Leg., Session Acts, 1885, p. 18.

It seems to have been assumed that this last act had the effect to repeal the forfeiture provisions of the Acts of 1879 and of 1883, so that there remained, after its

passage, no statutory provision for the forfeiture of lands for non-payment of interest.

Such, it is submitted, was not its purpose or effect.

Let us see what was the state of the law with regard to this matter at the time of the passage of this law.

The interest on lands sold under the Act of 1879 was required to be paid by *March first*, and in case of failure a forfeiture by judicial procedure was provided for.

The interest on lands sold under the Act of 1883 was required by the terms of Section 10 of that act to be paid also by *March first*, and in the event of failure, the Commissioner of the General Land Office was authorized to declare the lands forfeited.

This Section 10 of this Act was amended by the Act of February 16, 1883, postponing the time of payment, so as to avoid the forfeiture, to *August first*.

This clearly applied only to sales made under the Act of 1883, leaving the time of payment of interest of lands sold under the Act of 1879, as provided in that Act, to-wit: *March first*. After which date, the interest being unpaid, proceedings might be instituted for forfeiture.

In order to put all purchasers of public lands, whether under the Act of 1883 or 1879, upon the same footing as to time of payment of interest, the last named Act of February 23, 1885, was passed, providing that the failure of "*a holder of public free school, University or asylum land, under a contract of purchase from the State*, to make the annual payments of principal or interest thereon *prior to the first day of August*, after the same becomes due, shall not cause a forfeiture of the rights of such holders in such land."

The attention of the court is called to the language of this act. It does not provide that a failure to pay the interest or principal shall not cause a forfeiture, but that failure to pay *prior to the first day of August*, shall not cause a forfeiture.

Now that is just what was provided by the preceding Act of February 16th, passed only seven days before, with regard to lands sold under the Act of 1883. That act provided that failure to pay by the first day of August shall, *ipso facto*, work a forfeiture as to lands sold (under that Act of 1883). Of course it follows that failure to pay "prior to the first day of August" would not cause a

forfeiture and as to sales under the Act of 1883, this Act of February 23rd made no change in the law; they still remained subject to forfeiture if the interest was not paid by the first day of August, but not for failure to pay prior to that date.

By the terms of the last act, however, sales made under the Act of 1879, which, without this act were subject to forfeiture (by judicial proceedings) for failure to pay interest *by March 1st*, were not subject to such forfeiture for failure to pay *prior to the first day of August*, but were subject to forfeiture as in the original act for failure to pay by the first day of August. This Act of February 23rd therefore had merely the effect of allowing all holders of school, etc., lands until August 1st to pay interest instead of March 1st, as previously provided as to some of such purchases. The language is, "the failure of a holder of public free school, University or asylum land," etc., thereby expressly including all purchasers of such land under any laws for that purpose, including purchasers under the Act of 1879, who without this act would have been required to pay by March 1st to save the forfeiture.

The policy of the Legislature to authorize the Land Commissioner to declare a forfeiture, without judicial proceedings, was inaugurated by the Act of 1883, departing from the policy of judicial forfeiture as declared in the Act of 1879. On the sixteenth of February 1885, this policy is still adhered to by the amendment of that date of Section 10 of the Act of 1883, which merely postponed the date of payment and of forfeiture. Is it reasonable to suppose that within seven days, towit, on the 23rd of February, 1883, the Legislature would have departed so entirely from this policy as to provide that failure to pay interest or principal should not cause a forfeiture at all? And in this connection it is to be remarked that every act for the sale of the public lands passed by the Legislature of Texas since this Act of 1879, has provided for a forfeiture by the Land Commissioner for failure to pay interest by a certain named date, such date having, however, been sometimes extended, and liberal provisions made for reinstatement, etc.

This shows the uniform policy which has prevailed, and which is, we contend, in keeping with the interpre-

tation of the language of the Act of February 23, 1885, herein contended for, and entirely inconsistent with the interpretation assumed by plaintiff in error (and also by the State court) to be correct.

It may be suggested that the title of this Act shows a different intention on the part of the Legislature. This title is "An Act to prevent the forfeiture of the rights of purchasers of public free school, University and asylum land," and it may be argued from this that the effect of the act, if construed as we have contended, would be to postpone and not to prevent such forfeitures. This we do not think should control the intent and meaning of the act as clearly shown by its terms, when taken in connection with other legislation *in pari materia.* (Price vs. Forrest, 173 U. S., 410-427).

This precise point seems not to have been raised in this case in the State courts. It rather seems to have been assumed that the Act of February 23, 1885, was intended to relieve purchasers entirely of the condition of forfeiture for failure to pay interest, and the only question was whether the subsequent Act of 1897, authorizing such forfeitures was an impairment of the obligations of the contract, which question could not have arisen, if the Statute be construed as is here construed. It is submitted that there has been no such construction of the Statute upon the point here arising, by the courts of the State, as would be binding upon this court, or prevent this court from giving to the Act the construction here contended for.

If this be the correct interpretation of this Act, the whole case of plaintiff in error falls to the ground. Having failed to pay the interest due, as shown by the record, by the first day of August, 1897 (no interest having in fact been paid since 1893. Record, p. 5), on the 20th day of August the land was forfeited by the Land Commissioner and sold to the defendant in error on November 17, 1897.

In the brief and argument on the part of the State of Texas, heretofore filed herein, counsel for the State seems to have fallen into the same misconception as to the meaning of the Act of February 23, 1885; resting upon the decision in Berrendo Stock Co. vs. McCarthy, 85 T. R., 412. A more careful consideration of its terms, how-

ever, has led to the conclusions here advanced, and to the further conclusion that there is nothing in the rule that this court will follow the settled construction placed by the highest court of a State upon its statutes, to require this court now to follow the construction placed upon this statute by the Supreme Court of Texas in the above case.

It is not denied that in that case it was held by our Supreme Court that the Act of February 23, 1885, repealed the provisions of Section 10 of the Act of 1883 with regard to forfeiture, and that after the passage of that act there was no provision for forfeiture for non-payment of interest.

The contrary was held by the Court of Civil Appeals in that case (20 S. W. Rep., 934), in accordance with the views here expressed, to which we beg to call the attention of this court.

In the case of Anderson vs. The Waco State Bank, 86 T. R., 619, at least a shade of suspicion is thrown over the soundness of the conclusions announced in the Berrendo case. The Berrendo case was afterwards followed, seemingly without question, upon this point, by the Court of Civil Appeals in Patterson vs. O'Docherty, 28 S. W. Rep., 293; Cuba vs. Island City Savings Bank, 41 S. W. Rep., 532, and other cases, but in the late case of Fristoe vs. Blum, 92 T. R., 85, a broad intimation is thrown out by the Supreme Court of the State that the court does not consider the opinion in the Berrendo case as sound.

In the opinion in Fristoe vs. Blum (p. 81) the court says: "For the purposes of this case we accept the proposition that between February 23, 1885, and the passage of the Act of April 1, 1887, there was no law in force which empowered the Commissioner of the General Land Office to declare the forfeiture of this class of contracts." The court then proceeded to decide the question involved upon principles which make it entirely immaterial whether the proposition above stated was correct or not. Before concluding the opinion, however, the court says (p. 85): "We therefore do not hesitate to say that the decision in the case of Berrendo Stock Co. vs. McCarty is not authority upon the question now presented to this court. We have considered this case upon the assumption that the decision in Berrendo Stock Co. vs. McCarty is correct,

but should the same question hereafter arise, the opinion will not be considered as approving that case."

This must be regarded as destroying the effect of the Berrendo case as a conclusive settlement of the question here presented, and to leave this court free to adopt the construction of the act of February 19, 1885, here contended for.

There is no doubt that, if it had been necessary to do so in supporting the conclusions arrived at in Fristoe vs. Blum, the Supreme Court would have overruled the decision in the Berrendo case, instead of intimating that in a proper case they would do so.

If the court cannot agree with counsel for the State, however, as to the interpretation of this act; in so far as concerns the other question which arises upon a contrary interpretation, towit: that the Act of 1897, under which the forfeiture is claimed to have been declared, impairs the obligation of the contract of sale; we rest the case upon what has been advanced in the brief and argument hereinbefore filed for the State of Texas, and upon the opinion of this court in the case of Wilson vs. Standefer therein referred to.

Inasmuch as the brief referred to and heretofore filed in this court was not printed in accordance with the rules adopted by the court, the same is here reprinted and filed.

Respectfully submitted,

C. K. BELL,

Attorney General of the State of Texas, on the part of J. M. Flack, Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 149.

W. T. WAGGONER, PLAINTIFF IN ERROR

vs.

J. M. FLACK, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF C. K. BELL, ATTORNEY GENERAL OF THE STATE OF TEXAS.

In this cause the defendant in error, J. M. Flack, does not appear in this court by brief of counsel or otherwise.

On February 4, 1902, the following order was made herein:

"Notice of the pendency of this cause directed to be given to the Attorney General of Texas, and leave is given to file briefs for defendant in error within twenty days. Counsel for plaintiff in error is required to file printed copies of statutes referred to."

And afterwards this court was kind enough to extend the time for filing brief by the Attorney General of Texas to thirty days.

The question involved in this case is one of very great public importance in the State of Texas, inasmuch as a decision of this question in favor of plaintiff in error

would necessarily result in the setting aside of all forfeitures of public lands falling under the same conditions as presented herein and the cancellation of all sales made of such lands after declaration of forfeiture by the Commissioner of the General Land Office.

For this reason, the State of Texas avails herself of the opportunity so kindly presented by this court in the order herein quoted and submits, briefly, in support of the judgment rendered in this cause in the State courts the following:

It is submitted *in limine* that the sole question to be decided has been decided by this court at the present term in the case of T. K. Wilson vs. J. F. Standifer, No. 105, opinion rendered March 3, 1902. In the opinion in that cause this court quotes with approval from the opinion of the Supreme Court of Texas, and concludes as follows:

"Upon the whole, we agree with the conclusion of the Supreme Court of Texas, that no contract rights of a purchaser under the Act of 1879 were impaired by the provisions of the subsequent Act of 1897; that the twelfth section of the Act of 1879 was not, in legal contemplation, a stipulation by the State that the only remedy which might be resorted to by the State was the one therein provided for; that, in the language of Chief Justice Marshall, 'the distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct.'"

I shall endeavor here simply to show that the case at bar falls clearly within the principle here decided.

As in the case of Wilson vs. Standifer, the forfeiture here complained of as being violative of the Constitution of the United States, was had by the Commissioner of the General Land Office under the provisions of the Act of 1897, which provided for "office forfeitures," as distinguished from "judicial forfeitures" of lands sold, in case of failure to pay interest.

This act is, as shown in the brief for W. T. Waggoner, plaintiff in error, on page 7, "That if upon the first day of November of any year any portion of the interest due

by any person to the State of Texas, for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, University, or any of the other various State institutions, has not been paid, it shall be the duty of the Commissioner of the General Land Office to endorse on the obligation for said lands, 'Lands Forfeited,' and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law; provided, the purchaser of said land shall have the right at any time within six months after such endorsement of 'Land Forfeited' to institute a suit in the district court of Travis county, Texas, against the Commissioner of the General Land Office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but if no suit has been instituted as above provided, such forfeiture of the Commissioner of the General Land Office shall then become fixed and conclusive; provided, that if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death," and is referred to in the opinion of this court in Wilson vs. Standifer, page 4 (paragraph 12 of statement of facts quoted in the opinion).

In each case there was a forfeiture of the land by the Commissioner of the General Land Office without judicial ascertainment and afterwards a sale to the defendants in error, respectively.

In the case of Wilson vs. Standifer the sale afterwards canceled for failure to pay interest was made under the Act of July 8, 1879.

This statute does not give to any officer of the State the right to declare a forfeiture of sales made thereunder for failure to pay interest, but, on the contrary, the act, in Section 12, expressly provided for a suit in the district court by the county or district attorney on the part of the State, in case of such failure. It was contended

by plaintiff in error in Wilson vs. Standifer that this provision as to judicial forfeiture was part of the contract of sale under that act, which could not be abrogated by a subsequent act providing for a declaration of forfeiture by the Commissioner of the General Land Office without judicial action. This contention was overruled by this court.

In the case at bar the sale was made under the Act of 1883, Section 10 of which expressly provided for a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment, for non-payment of interest, by March 1, 1883.

By an amendment of this section in 1885, August 1st was fixed as the date of payment instead of March 1st, as in the original act. Previous to the sale of the section of land involved in this suit, however, the Act of February 23, 1885, was passed. This act is set out in brief of plaintiff in error (pp. 5 and 6). The first section of this act is as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the failure of a holder of public free school, University or asylum land under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land."

So the question is, is this provision a part of the obligation of the contract between the State and a purchaser of public land, entered into while this act was in force, to such an extent as to preclude the Legislature from afterwards providing for a forfeiture or rescission of such sales by the State through the proper officer without judicial ascertainment?

While this question was not directly passed upon by the Supreme Court of Texas in Fristo vs. Blum, 92 Texas, 76, as the sale in that case was made under the Act of 1883, prior to the passage of the Act of 1885 above recited, the opinion in that case is broad enough, and certainly was expressly intended to be broad enough, to embrace sales made under that act after the passage of the Act of 1885.

The following expression from the opinion of the

Supreme Court of Texas in Fristo vs. Blum, *supra*, is here quoted (pp. 83-84):

"But it is said that a construction of section 11, which would give to the Commissioner of the General Land Office the authority to enter a forfeiture as in this case would render the act unconstitutional, because it would be giving to it a retroactive effect by which it would violate the obligation of the contract. A sufficient answer, so far as this case is concerned, to that proposition would be that this contract was entered into when such a law existed and provided for the doing of the very thing that the Commissioner has done, and the repeal of that law could not constitute on the part of the State an obligation that it should not be restored in the future. We prefer, however, to put this decision upon the broad ground and stronger position that where a right exists the Legislature may give a new remedy, provided it does not deprive either party of a substantial right. Sutherland vs. De Leon, 1 Texas, 305; Johnson vs. Taylor, 60 Texas, 362."

This will suffice to show the difference and the only difference between the case of Wilson vs. Standifer and the case at bar.

The Act of 1883 provided for forfeiture by the Commissioner of the General Land Office without the action of the courts. The Act of 1885 provided that the failure to make annual payment of principal and interest prior to August 1st, after the same becomes due, shall not cause a forfeiture of the rights of such purchaser.

Under the Act of 1883 the only remedy provided by which the State could rescind the contract and recover the land was the remedy of a declaration of forfeiture by the Commissioner of the General Land Office without judicial ascertainment. There is no express reservation of the cumulative remedy of judicial proceedings for that purpose, as in the Act of 1897, so that the most that can be said for the contention of plaintiff in error is, that after the passage of the Act of 1885, no remedy was provided *by statute* for rescission or forfeiture by the State in case of failure to pay interest on lands sold while the Act of 1885 was in force. In other words, the Act of 1885 repealed Section 10 of the Act of 1883. This did not bind the State, as an obligation of its contract of sale,

not to provide a remedy by future legislation with regard to such sales. (Fristo vs. Blum, 92 Texas, 84; Sturgis vs. Crowninshield, 4 Wheaton, 122.)

The only difference, then, between the case at bar and Wilson vs. Standifer is that in the former the sale was made under a statute which did not provide any remedy for failure to pay interest, while in the latter the sale was made under a statute which did provide a particular remedy, *i. e.*, by judicial proceeding for a rescission of the contract and the recovery of the land.

If, as declared in Wilson vs. Standifer, the Legislature might, without violating the obligation of the contract of sale, drastically change the remedy expressly provided in the statute under which the sale is made, it is respectfully submitted that there can be no sound reason for holding that it could not, by subsequent legislation, provide a remedy where none is given in the statute under which the sale is made.

If the remedy expressly given by Section 12 of the Act of 1879 was not a part of the contract, as held in the above case, then surely the elimination by the Act of 1885 of the statutory remedy given by Section 10 of the Act of 1883, cannot be said to be a part of the contract of sale under that act.

The repeal by the Act of 1885 of the provisions of Section 10 of the Act of 1883, left unimpaired the common-law right of rescission (Fristo vs. Blum, *supra*), taking away only the statutory remedy of forfeiture. The case is as if no remedy at all had been provided in that act. There was left the obligation of the purchaser to pay according to the terms of his contract, and the common-law remedy of the State for a rescission of the contract of sale for failure on his part to do so. After the sale in this case, the Legislature changed the common-law remedy, or rather adds to it the specific remedy of rescission by the act of the Commissioner of the General Land Office.

It is submitted that the case is clearly within the doctrine announced in Wilson vs. Standifer by this court and in Fristo vs. Blum, by the Supreme Court of Texas.

It is not too much to say that hundreds of titles of settlers on public lands in Texas will be overthrown if the contention of the plaintiff in error is sustained by this court. These titles rest upon a construction of the stat-

ute law of the State by the Supreme Court. We quote from the opinion of this court in Wilson vs. Standifer:

"But as the general rule is that the interpretation put on a State constitution or laws by the Supreme Court of that State is binding upon this court, and as our right to review and revise decisions of the State courts in cases where the question is an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of the court, even in such a case, to follow the decision of the State court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating the exercise of the taxing power, or relating to the State's disposition of its public lands."

It is respectfully submitted that the judgment of the Court of Civil Appeals of Texas should be affirmed.

C. K. BELL,
Attorney General,
T. S. REESE,
Assistant Attorney General,
Counsel for the State of Texas.

Supreme Court of the United States.

No. 28.—October Term, 1902.

W. T. Waggoner, Plaintiff in Error, vs. J. M. Flack. } In error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

[February 23, 1903.]

The plaintiff in error brought his action against the defendant in error in a District Court of Texas to recover as owner certain land described in his petition, and of which he alleged the defendant to be in possession. The defendant denied the averments of the petition, and upon the trial judgment was given in his favor and he was adjudged to be the owner of the land. An appeal was taken to the Court of Civil Appeals of Texas, where the judgment was affirmed, and upon application to the Supreme Court of the State for a writ of error, the application was denied. The plaintiff then sued out a writ of error from this court to the Court of Civil Appeals, and the record has been brought here for review.

The plaintiff in error alleges the existence of a contract with the State of Texas, the obligations of which he asserts have been impaired by subsequent legislation in that State. The case involves an inquiry into some of the legislation of the State in regard to its public lands, providing for their sale and for the application of the proceeds of such sales for the benefit of its public schools and for other public purposes.

The State has been and is the owner of a large amount of public lands, portions of which it has put upon the market for sale from time to time, under different acts of its legislature, which acts have provided a general system for the sale or leasing of such lands and for the disposition of the proceeds arising therefrom. Among others the legislature passed the act of 1879, (chap. 28, Laws of that year, p. 23.) That act provided in detail for the sale of certain public lands, and the terms and conditions upon which the sales were to be made and patents therefor granted. The twelfth section provided that, upon a failure of the purchaser to pay the purchase money as agreed upon, it should be the duty of the district attorney to cause a writ to be issued to show cause why the purchaser should not be ejected from the land, and upon his failure to show such cause, a judgment was to be rendered against him and a writ of possession issued in favor of the State. In 1881 the act was amended in immaterial matters.

By chapter 88 of the Laws of 1883, p. 85, another general system for the sale of the public lands for the benefit of the public school system, &c., was enacted, the ninth and tenth sections of which provided for payment of installments of principal and interest, and in case of failure to pay, the lands were to be entered as "lands forfeited," without any judicial inquiry. This act provided that the interest on the obligations given by the purchaser of the lands should be payable on the first of March in each year. Subsequently by chapter 12 of the Laws of 1885, p. 13, approved February 16, 1885, the ninth and tenth sections of the act of 1883 were amended, the right of forfeiture of the land being still retained, only there was an extension of the time for payment of interest from the first of March to the first of August in each year before the forfeiture could be asserted. In one week after the passage of the act last named the same legislature passed an act, approved February 23, 1885, (Laws of Texas, 1885, p. 18,) by which it was enacted "That the failure of a holder of public free school, university or asylum land, under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due, shall not cause a forfeiture of the rights of such holder in such land." By this act it is claimed that all laws providing for forfeitures of land because of non-payment of installments of principal or interest prior to August first after the same became due were repealed, and while the law thus stood the plaintiff in error's grantor purchased the land in controversy.

By chapter 99 of the Laws of 1887, page 83, a further provision for the sale or leasing of public lands was made. Section 11, page 86, restored the provisions as to forfeiture without resort to judicial proceedings, and by chapter 47, Laws of 1895, section 11, as well as by chapter 37, Laws of 1897, page 39, approved March 25 and taking effect August 20, 1897, further provision was made in regard to forfeitures without a resort to the courts. It was under the act of 1897 that the forfeiture herein was asserted, and the first section, the only material one here, is set forth in the margin.*

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*SEC. 1. *Be it enacted by the Legislature of the State of Texas*, That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, university, or any of the other various State institutions, has not been paid, it shall be the duty of the land commissioner to endorse on the obligation for said lands, "Lands forfeited," and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law: *Provided*,

D. B. Phillipps, under the act of 1883, as amended by the act of February 16, 1885, and modified by the act of February 23, 1885, made application to purchase the land in question on the 30th of October, 1885, and the land was duly awarded him in November of that year. The plaintiff in error, by proper transfers and deeds, has become the vendee, or grantee through others, of Phillips, and represents all the rights that the latter or his grantees had with regard to the premises in controversy.

Phillips, or those claiming under him, paid the interest on the purchase money up to January 1, 1893, and no interest was thereafter paid. The land was forfeited for non-payment of interest since 1893, by the commissioner of the general land office, without any judicial procedure or suit in court, on August 20, 1897, the day the act of 1897 took effect. In answer to a certified question from the Court of Civil Appeals, the Supreme Court of the State held in this case that the State had the right to so forfeit the lands by virtue of that act.

Some time after August 20, 1897, namely, on December 16, in that year, plaintiff through his agent tendered the State treasurer $286.95 to pay up all accrued interest due on the land purchased by Phillips, and on the last-named date through his agent he asked the reinstating of the account of Phillips, and forwarded to the commissioner of the general land office the transfers or deeds, or copies of the same, showing the chain of title from Phillips to himself, and these transfers were filed by the commissioner in his office, but he refused to reinstate as demanded, on the ground that the rights of the defendant Flack had intervened. Flack, prior to this tender and demand, and on November 17, 1897, made his application in due form to purchase the land. His application was on that day accepted, and his obligation to pay the purchase money was received, and thereafter in March, 1898, the land was awarded him on his application of the previous

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The purchaser of said land shall have the right, at any time within six months after such endorsement of "Lands forfeited," to institute a suit in District Court of Travis County, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive: *Provided*, That if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death.

This act is cumulative, and is not intended to deny to the State the right to institute any legal proceedings that may be deemed necessary to secure the purchase money or possession of the land so sold. And this act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the legislature under which land may have been sold by the State.

November. On August 13, 1898, after this suit was brought, the plaintiff in error, through his attorney, again made written application to have the Phillips account for the purchase of the land reinstated, and for this purpose tendered to the State treasurer of Texas, to pay the interest in arrear, the sum of $345.25, which application was rejected on the ground of the intervening rights of the defendant Flack.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

Referring to the facts in this case, it is seen that the question arising is as to the right of the State to proceed under the act of 1897 to forfeit the lands held by the plaintiff in error for non-payment of interest.

At the time when the land was purchased by Phillips in November, 1885, the act of 1883 as amended by the act of February 16, 1885, was in force, excepting, it is said, that the act of February 23, 1885, repealed the provisions in regard to forfeiture which existed in the prior acts of 1879, 1883 and 1885, so that when Phillips purchased, the State had no right to forfeit the lands, as had theretofore been provided by law.

The Attorney General of Texas in his brief filed herein now argues that the act of February 23, 1885, did not unqualifiedly repeal the law in regard to forfeiture as theretofore existing, but simply regulated it so as to place on the same terms those who had purchased lands under the act of 1879 and those purchasing under the act of 1883 as amended by the act of February 16, 1885, so that no forfeiture could be claimed under any act until after August 1 in any year. As the act of 1879 made the interest payable on the first of March in each year, and the subsequent acts extended the time for the payment of the moneys for lands sold under their authority to the first of August, it is contended that the purpose and effect of the act of 1885 were to place the purchasers of lands under all acts upon the same footing as to the time for the payment of interest. This was in substance held by the Court of Civil Appeals of Texas in 1892 in *Berrendo Stock Company* v. *McCarty*, (20 S. W. 933.) The case was, however, reversed in the Supreme Court in 1893, (85 Tex. 412,) and that court in 1891, in *Culbertson* v. *Blanchard*, (79 Tex. 486, 493,) had also held the same principle it announced in the Berrendo case.

It is true that *Anderson* v. *Bank*, (86 Tex. 618,) and *Fristoe* v. *Blum*, (92 Tex. 72, 85,) throw some doubt upon the correctness of the former decisions of the Supreme Court in this respect, but we do not feel here called upon to construe the State statute otherwise than it has been construed up to this time by the court of last resort of the State.

Although this case involves the question of an impairment of an alleged contract by subsequent legislation, and we are not therefore bound by the construction which the State court places upon the statutes of the State

which are involved in such an inquiry, yet, as the true construction of the particular statute is not free from doubt, considering the former legislation of the State upon the same subject, we feel that we shall best perform our duty in such case by following the decision of the State court upon the precise question, although doubts as to its correctness may have been uttered by the same court in some subsequent case. (*Wilson* v. *Standefer*, 184 U. S. 399, 412.)

We come, then, to the question of what was the contract, and whether it has been impaired by virtue of the enactment of the statute of 1897, under which the forfeiture has been enforced? Although not material it may yet be observed that the act of 1897 is not the first act which was passed subsequently to the act of 1885, reinstating the provisions for a forfeiture. By section 11 of the act of 1887, (Laws, 1887, pp. 83, 86,) provision was again made for forfeiting the lands on non-payment of moneys due, and the same was continued by section 11 of the Laws of Texas of 1895, pp. 63, 67.

We assume that, at the time these lands were purchased by Phillips, no statute existed providing for forfeiture by entry on the books of the State commissioner of the general land office, and it is admitted that only by virtue of the act of 1897 can the State now claim the right to forfeit the lands by an entry to that effect on the account kept with the purchaser, because of the failure to pay the interest since 1893. The plaintiff in error asserts that the statute of 1897, reinstating or providing for the right of the State to thus forfeit the lands for non-payment of moneys due by the purchaser of land, is an impairment of the contract created between the State and Phillips at the time his application for the land was granted by the State authorities; and the plaintiff in error asserts he has succeeded to all the rights of Phillips, and this is not denied.

We must first decide what were the obligations of the contract which was created by the granting of Phillips' application for the purchase of this land and the taking of his notes therefor. The Laws of Texas of 1883, chapter 58, as amended by chapter 12, page 13, Laws of 1885, furnish the evidence of the obligations of the contract. By those acts it was made the duty of the commissioner of the general land office, after an application for a grant of land had been made and approved, to issue a patent to the purchaser or his assigns, &c., upon payment of all the purchase money and interest upon notes given for the purchase of the land, and provision was made for the giving of the notes or other evidences of the obligation of the purchaser to pay for the land. His obligation was to pay these notes as they matured. The obligation of the State was to give the patent as mentioned. What particular remedy then existed by which the State might enforce the obligations of the contract made by the purchaser is not

material in this aspect of the case. It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away.

It appears in the record that the plaintiff in error, or those he represents, failed for years to comply with the obligations of the contract, and failed to pay the interest as it became due, as they promised, and hence the contract was violated.

The question, then, is, what is the remedy against the party who has broken the contract? The statute of 1897 is turned to for the authority to take possession of the land, the right to keep which the plaintiff in error has ceased to retain because of his failure to do that upon which such right was founded.

The plaintiff in error, however, says to the State, you cannot avail yourself of the remedy provided by the act of 1897, because it did not exist when I purchased the land, and you then contracted not to create any such remedy against me, and the evidence of the contract is to be found in the statute of February 23, 1885, which was in force when I purchased. But the answer is that, although at the time Phillips purchased the land a statute had taken away the remedy by way of forfeiture, as therein stated, yet the act taking away the remedy did not constitute a contract on the part of the State with all who purchased lands from it at that time, that it would never pass any other act by which the State might be empowered through its agents to forfeit the lands and take possession thereof by virtue of such forfeiture. The act of February 23, 1885, was a mere enactment, declaring the law to be as therein stated, upon the subject of a remedy for a violation by a purchaser of the obligations of his contract, and it did not assume to bind the hands of any future legislature that might think proper to deal with the subject. There was no promise or contract expressed in the statute that the State would not enlarge the remedy or grant another on account of the purchaser's violation of his contract, and we think no such contract is to be implied.

A purchaser of lands at the time Phillips purchased had no right to assume that the State would not alter the law in the future so far as to give it another and better or a quicker remedy for a violation of his contract by the purchaser, than existed at the time the purchase was made. To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem

appropriate, is an exercise of sovereignty, and it cannot be supposed that the State in a case like this, contracts in a public act of its legislature, to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies as against those who purchase lands while the act remains alive. No such language is to be found in the act in question, and none ought to be implied.

We cannot discern the difference in principle between this case and that of *Wilson* v. *Standefer*, (184 U. S. 399,) which involved a portion of this same legislation. In that case the lands were purchased under the act of 1879, which provided (sec. 12) for a forfeiture after judicial inquiry determining the failure of the purchaser to pay the annual installments of interest as they became due. Subsequently the act of 1897, already mentioned, was passed and that act, it is seen, authorized the commissioner, when any portion of the interest due by the purchaser had not been paid, to declare a forfeiture of the purchase without judicial aid, and it gave to his action the effect of putting an end to the contract. It was under the act of 1897 that the forfeiture was declared in that case. There, as here, it was contended that the act of 1897 violated the contract between the parties. It was urged that as the act of 1879 provided a remedy by a resort to judicial proceedings for the purpose of enforcing a forfeiture, that such remedy was a part of the contract, and that the act of 1897, which provided for a forfeiture of the lands without judicial action, was a violation of the contract, and therefore void. This court held that the stipulation in the twelfth section of the act of 1879, providing for a judicial forfeiture, did not amount in legal contemplation to a promise by the State that the only remedy which might thereafter be resorted to by it was the one therein provided for. The court recognized the plain distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation, and it held that the remedy might be modified and enlarged without impairing such obligation.

It is to be noted that the act of 1897 does not take away from the purchaser the right to be heard in a court of justice upon the question whether he, in fact, is in default in his payments of the obligations given by him for the land which he purchased. The act of 1897 grants the purchaser six months after the land commissioner has endorsed on the purchaser's obligation for payment for the land, the words "lands forfeited," within which the purchaser may institute suit in the District Court of Travis County, Texas, against the commissioner for the purpose of contesting the forfeiture and setting aside the same, upon the ground that the facts do not exist authorizing such forfeiture.

Neither Phillips nor any of the successors to his title availed themselves of the opportunity to be judicially heard afforded by the law of 1897, and, as stated by the court in *Wilson* v. *Standefer*, (*supra*, p. 415,) the reason clearly appears in the admitted facts that the payments were in arrear for a considerable period of time, and that the tender made, if it ever had any legal effect at any time, was manifestly too late after the State had declared a forfeiture and sold the land to another.

We cannot see any difference in principle between a case where an act was in existence when a contract was made, providing a certain remedy for a violation of the contract, and then after the contract is entered into, the legislature passes another act, giving an altogether different remedy, as in *Wilson* v. *Standefer*, (*supra*,) and a case where an act which denied the remedy of forfeiture when the contract was made, was repealed by a subsequent enactment which provided a forfeiture as a remedy. In both cases there is a plain alteration of remedy, while in neither is there any contract springing from the passage of the first act that no other remedy more effective should be given as against one who purchased land during the existence of the statute. The right to rescind the contract on the part of the State, upon the failure of the purchaser to pay as he had agreed, resided in the State at common law, as the Supreme Court of Texas has held. (*Fristoe* v. *Blum*, 92 Texas, 76, 84.) The act of 1897 simply provided a particular means by which such right might be enforced.

We are of opinion that the act of 1897 does not impair the obligation of any contract within the meaning of the Federal Constitution, as asserted by the plaintiff in error, and the judgment of the Court of Civil Appeals of Texas is therefore

Affirmed.

Mr. Justice BREWER concurred in the result.

True copy.

Test:

Clerk Supreme Court, U. S.